

STATE BOARD OF EDUCATION
ADMINISTRATIVE CODE
COMMENT/RESPONSE FORM

This comment and response form contains comments from the April 6, 2005 meeting of the State Board of Education when the draft regulations were considered at Proposal Level and from oral and written Public Testimony.

Topic:	Programs to Support Student Development	Meeting Date:	August 3, 2005
Code Citation:	N.J.A.C. 6A:16	Level:	Adoption
Division:	Division of Student Services	Completed by:	Office of Program Support Services

Summary of Comments and Agency Responses:

The following is a summary of the comments received from State Board of Education members and public commenters and the department's responses. Each commenter is identified at the end of the comment by a number, which corresponds to the following list:

1. Debra Casha, Vice President
State Board of Education
2. Ronald K. Butcher, Member
State Board of Education
3. Kathleen A. Dietz, Member
State Board of Education
4. John A. Griffith, Member
State Board of Education
5. Thelma Napoleon-Smith, Member
State Board of Education
6. Edward M. Taylor, Member
State Board of Education
7. Roberta Van Anda, Member
State Board of Education
8. Elizabeth Athos, Esq.
Education Law Center

9. Barry J. Galasso, Ed.D
New Jersey Association of School Administrators
10. Christopher D. Kniesler
New Jersey School Boards Association
11. Melville D. Miller
Legal Services of New Jersey
12. Susan E. Peters, Senior Vice Principal,
Clifton High School

GENERAL COMMENTS

1. COMMENT: The commenter complimented the department for its work on the development of the regulations and its responses to the comments on the regulations. **(1)**

RESPONSE: The department thanks the commenter.

2. COMMENT: The commenter stated that his questions and concerns have been adequately addressed by the department; complimented the department for its work on the regulations; and expressed appreciation for the opportunity to participate on the department's advisory committee for the student conduct code. **(6)**

RESPONSE: The department thanks the commenter and appreciates his assistance in the development of the student conduct regulations.

3. COMMENT: The commenter expressed support for the graduated system of student discipline set forth in the proposed rules. **(10)**

RESPONSE: The department thanks the commenter for expressing support for a graduated system of student discipline in the proposed rules.

4. COMMENT: The commenter requested that the State Board postpone the approval for publication of the proposed rules. The commenter stated the proposed rules contained many good things, but expressed the opinion that there remain significant omissions and errors to address. **(8)**

RESPONSE: The department disagrees and intends to move forward with its published schedule of rule making. The rules have been available for review and comment since October 6, 2004, in accordance with rulemaking proceedings pursuant to N.J.A.C. 1:30, Rules for Agency Rulemaking.

The comments received from the Education Law Center on December 15, 2004 were considered and responded to by the department. The most recent correspondence from the commenter was received immediately prior to the close of business on April 5, 2005, which afforded the department with insufficient time to review and respond to the comments, since the submission was the day before the State Board of Education was scheduled to consider on the draft regulations at proposal level.

The draft regulations were approved by the State Board of Education at proposal level on April 6, 2005 and are scheduled to be considered at adoption level on August 3, 2005. However, the department will consider and respond to the comments that were provided by the commenter on April 5, 2005, including the provisions that the commenter believes contain significant omissions and errors, at adoption level.

The department thanks the commenter for stating that the proposed rules contain many good things.

5. COMMENT: The commenter stated that the proposed amendments are extensive and requested that the effective date of the proposed regulations be concurrent with the sunset date of the current regulations, May 7, 2006, in order for districts and administrators to fully comply with the proposed amendments. **(9)**

RESPONSE: The department disagrees. The proposed rules conform to existing statutes, regulations and case law, which schools are already obligated to abide. Therefore, the department does not have the authority to delay implementation of currently effective statutes, rules and case law. Where possible, however, the department will advise school districts of the implementation of procedures in the proposed rules that may be delayed.

6. COMMENT: The commenter asked what redress a student has when he or she has been prevented from participating in interscholastic athletic activities. **(4)**

RESPONSE: If a student is prevented from participating in interscholastic athletics due to a consequence imposed by the district board of education and chooses to appeal the action, the student would do so in accordance with N.J.A.C. 6A:3-1.3 through 1.17. If a student is prevented from participating in interscholastic athletics due to a decision rendered by the New Jersey State Interscholastic Athletic Association (NJSIAA) and chooses to appeal the action, the student would do so in accordance with N.J.A.C. 6A:3-7.1 through 7.6.

7. COMMENT: The commenter stated that the regulations should establish standards for the protection of First Amendment rights of students and should provide guidance for when student speech is subject to discipline. **(8)**

RESPONSE: The department disagrees. The department is not authorized to define Constitutional rights. While Constitutional rights are not regulated in the rules, they are implicitly addressed in the provisions of the rules. Issues regarding

Constitutional rights, such as First Amendment rights, are best handled on a case-by-case basis, since they are fact sensitive.

8. COMMENT: The commenter stated that the use of the terms “general education” and “special education” are not appropriate and the regulations improperly distinguish between children removed from the “general education program” and children removed from the “special education program” instead of distinguishing between procedures and services required for or limited to general education students and students with disabilities. The commenter expressed concern that the terms can lead to the misconception that special protections available to children with disabilities apply only to children in special education placements and do not apply to children with disabilities served in a general education setting. Additionally, the commenter stated that the regulations should clarify that in the context of student discipline, special protections are available to all children with disabilities, whether they are placed in a special or general education program. (8)

RESPONSE: The department disagrees that the rules improperly distinguish between children removed from the general education program and children removed from the special education program. The rule text refers to “students with disabilities” and “general education students,” rather than to student placements. The department also disagrees that the regulations should further clarify that in the context of student conduct, special protections are available to all children with disabilities, whether they are placed in a special or general education program. The rules regarding student conduct in N.J.A.C. 6A:16-7.1(a)7, 7.1(c)3, 7.1(c)4iv, 7.2(a)5ii, 7.2(d), 7.3(a)8ii, 7.3(a)12, 7.3(g)1, 7.3(h), 7.5(a)2i, 7.3(c), 7.8(a)3iv and 7.8(b) clearly set forth that special protections are available to all children with disabilities regardless of placement.

9. COMMENT: The commenter stated that several sections do not provide guidance with respect to the rights of children with disabilities under IDEA. Specifically, the commenter:

- stated that N.J.A.C. 6A:16-5.5(d)4 and 5.6(d)4 should include a statement that for a child with a disability who commits an offense with a firearm, the school district must provide law enforcement with a copy of the student’s special education and disciplinary records pursuant to 34 C.F.R. 300.529(b) and U.S.C. 1415(k)(9)(b), consistent with the provisions of FERPA.
- recommended that N.J.A.C. 6A:16-7.1(a)6 make clear that district codes of conduct be construed in a manner consistent with IDEA and Section 504 and the State special education code in addition to the students’ IEP and 504 plans and state that children with disabilities have no less protection than any other students.
- recommended that the regulations for short-term suspensions address that disciplinary problems be referred to the IEP team and addressed through the IEP process, even if a child is suspended, and make clear that where a student is suspended on more than one occasion and the total number of suspensions total more than ten days, that the student be referred to the IEP team for a determination as to whether the suspensions amount to a change in placement.

- stated concern for the rights of children suspected of having a disability but are not yet eligible. The commenter recommended that the regulations address the circumstances where these rights can be critical to children with emotional and behavioral problems subject to discipline.
- recommended that N.J.A.C. 6A:16-7.3(a)6 include a child with disabilities right to a functional behavioral assessment and behavior intervention plan and the right to immediately challenge a negative decision related to the manifestation determination.
- stated that N.J.A.C. 6A:16-7.3(h) unlawfully limits a student's placement during a suspension to an interim alternative education setting. The commenter stated that the IEP team should be able to consider any program that may be appropriate and necessary to meet the student's needs as required under IDEA when a student is suspended from school for more than ten days. (8)

RESPONSE: For the reasons described below, the department disagrees that the rules do not provide guidance with respect to the rights of children with disabilities under the Individuals with Disabilities Education Act (IDEA).

- The department agrees that such records must be provided to law enforcement authorities. However, this requirement already exists in federal law, and is incorporated by reference in N.J.A.C. 6A:14, Special Education and appropriately cited in N.J.A.C. 6A:16-5.5(c), 5.5(d)5iv, 5.6(c) and 5.6(d)5iv.
- The department agrees that the rules in N.J.A.C. 6A:16-7.1, Code of Student Conduct should make clear that district codes of conduct must be construed in a manner consistent with IDEA, Section 504 and the special education rules and that children with disabilities have no less protection than any other students. The assurances and protections that the commenter requests are established in N.J.A.C. 6A:16-7.1(a)7, as follows: "For students with disabilities, subject to Individualized Education Programs in accordance with 20 USC § 1400, the Individuals with Disabilities Act, and accommodation plans under Section 504 of the Rehabilitation Act of 1973, the code of student conduct shall be implemented in accordance with the components of the applicable plans."
- The specific handling of suspensions involving students who have been determined to be in need of special education programs and services will be addressed, as necessary, in the special education rules. The special education rules are scheduled for presentation to the State Board of Education at First Discussion Level in the fall of 2005.
- The department disagrees that the N.J.A.C. 6A:16-7.8, Student Conduct should address the circumstances where the rights of children suspected of having a disability and are not yet eligible, but are subject to discipline, since these matters are appropriately addressed in the special education rules at N.J.A.C. 6A:14.

- The department disagrees that N.J.A.C. 6A:16-7.3(a)6 should include provisions regarding the rights of a child with a disability to a functional behavioral assessment and behavior intervention plan, and the right to immediately challenge a negative decision related to the manifestation determination. These matters are appropriately addressed in the special education rules at N.J.A.C. 6A:14.
- The department disagrees that N.J.A.C. 6A:16-7.3(h) unlawfully limits a student's placement during a suspension to an interim alternative education setting. The referenced rules do not limit rights to special education programs and services. The rules are clear that for a student with a disability who receives a long-term suspension, the district board of education must proceed in accordance with N.J.A.C. 6A:14-2.8 in determining, altering or changing the student's educational placement to an interim or alternate educational setting. N.J.A.C. 6A:16-7.3(h)1 through 3 establishes the following: that all procedural protections set forth in N.J.A.C. 6A:14 must be afforded to each student with a disability who is subjected to a long-term suspension; that all decisions concerning the student's educational program or placement must be made pursuant to the special education rules in N.J.A.C. 6A:14; and that the provisions of subsections (b) through (g) of N.J.A.C. 6A:16-7.3 do not apply to students with disabilities.

SUBCHAPTER 1. GENERAL PROVISIONS

10. COMMENT: The commenter recommended the expansion of the scope of the regulations to cover all preschoolers entitled to a free public education, not just preschool students with disabilities. **(8)**

RESPONSE: The department thanks the commenter for expressing the viewpoint. Since the scope of the rules, pursuant to N.J.A.C. 6A:16-1.2, is related to all of the provisions in N.J.A.C. 6A:16, Programs to Support Student Development, it is best to consider the scope of the proposed rules during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16.

11. COMMENT: The commenter stated that the definition of "Alternative Education Program" should include references to expulsions and long-term suspensions, since the commenter believes that is what is meant by "mandated for removal from general education." **(10)**

RESPONSE: Due to the substantive nature of the issue identified by the commenter, the department will consider the suggestion to include references to expulsions and long-term suspensions in the definition of "Alternative Education Program" during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16.

12. COMMENT: The commenter expressed concern regarding the definition of "Code of Student Conduct." The commenter cited instances when the Commissioner

has decided that boards of education can discipline students for conduct outside of a school-sponsored function. Specifically, the commenter cited S.H. v. Lacey Twp. Bd. of Ed., 1998 S.L.D. June 19; N.M. v. Board of Education of the Township of Wall, 2001 S.L.D. December 28; and M.D. and E.D. v. Buena Regional School District, 2000 S.L.D. Sept. 1. The commenter asked if the definition should be enlarged to include these private, unsponsored activities that the Commissioner found to be violations of board disciplinary policy. The commenter additionally, cited State Board 2003 S.L.D. December 3, which determined that distance is not determinative of the nexus between the activity and the board's ability to discipline. The commenter stated that this definition requires clarification. (10)

RESPONSE: The definition for "Code of Student Conduct" was expanded and included in the proposal level document approved by the State Board of Education on April 6, 2005. The definition follows: "Code of student conduct" means standards, policies and procedures established by district boards of education for positive student development and student behavioral expectations on school grounds, including on school buses or at school-sponsored functions, and, as appropriate, conduct away from school grounds, in accordance with N.J.A.C. 6A:16-7.6."

Sufficient guidance is provided to district boards of education in N.J.A.C. 6A:16-7.6 regarding when the proposed rules may be applied to student conduct away from school grounds. Specifically, as set forth in N.J.A.C. 6A:16-7.6(a)3, the consequences pursuant to N.J.A.C. 6A:16-7.6, Conduct away from school grounds must be handled in accordance with the district board of education approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, which must include a description of student's rights, and must be handled in accordance with the due process provisions and other requirements, as appropriate, pursuant to N.J.A.C. 6A:16-7.2, Short-term suspensions, N.J.A.C. 6A:16-7.3, Long-term suspensions and N.J.A.C. 6A:16-7.5, Expulsions. Parameters for the implementation of the rule derived from the R.R. case are established at N.J.A.C. 6A:16-7.6(a)1 and 2. Additionally, the proposed rules at N.J.A.C. 6A:16-7.6(a)2 establish that the authority to impose consequences for conduct away from school grounds will be exercised only when the subject of the consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.

13. COMMENT: The commenter requested additional clarification to the definition of "Expulsion." The commenter asked if "discontinuance of educational services or the discontinuance of payment of educational services" means that a school district is no longer required to provide educational services for an expelled student. The commenter cited the State Board decision in P.H. v. Bergenfield, 2002 S.L.D. July 2, which determined that a student who is expelled from school must be provided with an alternative education program until he graduates from high school or reaches his nineteenth birthday, whichever comes first. The commenter stated that resolving the conflict between the P.H. case and the proposed definition of "Expulsion" would provide greater clarity concerning local board authority over individual student discipline. The commenter stated that expulsion is a valuable disciplinary tool that ultimately protects all students and staff, and recommended that the State Board preserve the authority of local

boards of education to expel students where circumstances warrant, without imposing a duty to provide and pay for alternative education as required by the P.H. case. (10)

RESPONSE: The definition of expulsion at N.J.A.C. 6A:16-1.3: “the discontinuance of educational services or the discontinuance of payment of educational services for a student,” clearly means that a district board of education would no longer be required to provide educational services for an expelled student, if the district board of education acted in accordance with the provisions of N.J.A.C 6A:16-7, Student Conduct and other applicable statutes, rules and case law. The definition for the term “discontinuance” in Webster’s Ninth New Collegiate Dictionary is “the interruption or termination of a legal action...,” and the definition of the term “discontinue” is “to break the continuity of: cease to operate, administer, use, produce, or take,” “to abandon or terminate by a legal discontinuance,” and “to come to an end.”

Proposed N.J.A.C. 6A:16-7 establishes rules that clarify when the P.H. decision and the expulsion provisions apply. Specifically, throughout proposed N.J.A.C. 6A:16-7, it is established that the expulsion provision applies in the following circumstances: 1) after district boards of education have complied with the findings in P.H. v. Bergenfield, 2002 S.L.D. July 2; 2) subsequent to compliance with P.H. v. Bergenfield, a student has continued to exhibit behavior that warrants expulsion, pursuant to N.J.S.A. 18A:37-2; and 3) the district board of education has complied with all due process rights and responsibilities and all applicable statutes, regulations and case law. However, a district board of education may, at any time, reconsider its decision to discontinue educational services or discontinue payment of educational services for a student.

14. COMMENT: The commenter requested that the definitions of expulsion and suspension be written in simpler terms. The commenter suggested that the definitions be clear, practical, flexible and consistent with a common understanding of the terms. (8)

RESPONSE: The department disagrees. The simplicity and specificity provided in the definitions of short-term suspension, long-term suspension and expulsion, pursuant to N.J.A.C. 6A:16-1.3 facilitate common understanding and consistent application of the terms and implementation of the provisions at N.J.A.C. 6A:16-7.2, 7.3 and 7.5. In addition, the definitions are clear, able to be practically applied and are consistent with common and legal understanding of the terms, including those set forth at N.J.S.A. 18A:37-2. Short-term suspension is defined as “removal of a student for 10 school days or fewer from the general education program or the special education program, in accordance with N.J.A.C. 6A:14-2.8, but not the cessation of the student’s educational services.” Long-term suspension is defined as “removal of a student for more than 10 school days from the general education program, or the special education program when the appropriate procedures set forth in N.J.A.C. 6A:14-2.8 have been followed, but not the cessation of the student’s educational services.” Expulsion is defined as “the discontinuance of educational services or the discontinuance of payment of educational services for a student.” These definitions are clear, practical and easily understood.

The department also disagrees that there should be more flexibility in the definitions, since suspensions and expulsions are predetermined constructs. More flexible definitions would contribute to confusion and inconsistent implementation. The relative flexibility of implementation is contingent upon the establishment of codes of student conduct by district boards of education that must be based on the following requirements and parameters: 1) parent, student and community involvement, pursuant to N.J.A.C. 6A:16-7.1(a)1; 2) locally determined and accepted core ethical values adopted by the district board of education, pursuant to N.J.A.C. 6A:16-7.1(a)2; and 3) alignment with the purposes identified in N.J.A.C. 6A:16-7.1(a)(b) and the minimum components established in N.J.A.C. 6A:16-7.1(c).

15. COMMENT: The commenter referenced the proposed definition for “General Education,” and recommended that the proposed regulations clarify that the requirements applicable to students with disabilities be applied in a manner consistent with the most expansive definition of that term in order to effectuate the purpose and ensure that discipline of such students does not fail to take into account the nature and extent of the student’s disability. The commenter also stated that the regulations must be explicit that students with disabilities are entitled to receive, at a minimum, the rights afforded to general education students. **(11)**

RESPONSE: The department agrees. The rules regarding student discipline in N.J.A.C. 6A:16-5.5(c), 5.5(d)5iv, 5.5(f), 5.6(c), 5.6(d)5iv, 5.6(f), 6A:16-7.1(a)7, 7.1(c)3, 7.1(c)4iv, 7.2(a)5ii, 7.2(d), 7.3(a)8ii, 7.3(a)12, 7.3(g)1, 7.3(h), 7.5(a)2i, 7.3(c), 7.8(a)3iv and 7.8(b) clearly set forth that special education protections, as well as those afforded general education students, are available to all children with disabilities regardless of placement.

16. COMMENT: The commenter stated that the definition of “Harassment, Intimidation or Bullying” does not cover off-campus, unsponsored activities. The commenter stated that the comments made in comment #12 of this document regarding the definition of “Code of Student Conduct” also apply to this definition. **(10)**

RESPONSE: The commenter is correct in that the authorizing statute, N.J.S.A. 18A:37-14 specifies that the provisions of N.J.S.A. 18A:37-13 et seq. regarding harassment, intimidation or bullying only apply to acts that take place on “school property, at any school-sponsored function or on a school bus.” The district board of education’s policy under N.J.A.C. 6A:16-7.9, Intimidation, harassment and bullying, only would apply to off-campus, un-sponsored activities when the district board of education adopted policies under N.J.A.C. 6A:16-7.6, Conduct away from school grounds that made clear which provisions of N.J.A.C. 6A:16-7.9 applied to conduct away from school grounds.

The definition of “Code of Student Conduct” at N.J.A.C. 6A:16-1.3 makes clear that the code of student conduct adopted by the district board of education only applies to school grounds, school buses or school-sponsored functions. The definition further establishes

that the code of student conduct may apply to conduct away from school grounds, pursuant to N.J.A.C. 6A:16-7.6, if so decided by the district board of education in compliance with N.J.A.C. 6A:16-7 and all applicable statutes, regulations and case law.

17. COMMENT: The commenter stated that the sentence structure of the definition of “Long-term suspension” is misleading and should be amended to state: “Long-term suspension” is not the cessation of the student’s educational services, but the removal of a student for more than 10 days from the general education program or the special education program when the appropriate procedures set forth in N.J.A.C. 6A:14-2.8 have been followed.” The commenter asked how the term “cessation” is defined and if it is different from the term “discontinuance of education services” which is used in the definition of “expulsion.” The commenter also asked whether a school is required to provide home instruction so that it is not viewed as a cessation of educational services.
(10)

RESPONSE: The department disagrees that the sentence structure for the definition of “Long-term suspension” is misleading and should be amended, since the commenter’s proposal does not change the meaning of the definition.

While the dictionary definitions of the terms “cessation” and “discontinuance” are virtually identical, the department has determined that the term “cessation” used in the definition of “Long-term suspension” should be consistent with the term, “discontinuance,” used in the definition of “Expulsion.” Therefore the department will propose the following amendment, which replaces the term “cessation” with the term “discontinuance,” during the comprehensive review of the provisions in N.J.A.C. 6A:16 that will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-1.3

“Long-term suspension” means removal of a student for more than 10 school days from the general education program, or the special education program when the appropriate procedures set forth in N.J.A.C. 6A:14-2.8 have been followed, but not the [cessation]discontinuance of the student’s educational services.”

In addition, the provision of an educational service does not qualify as a cessation or discontinuance of educational services. If the district board of education elects to provide home instruction, the student would not have been expelled, pursuant to N.J.A.C. 6A:16-7.5, since the district board of education has not discontinued educational services or discontinued payment of educational services. The circumstances under which a district board of education must or may provide home instruction are established in N.J.A.C. 6A:16-10 and N.J.A.C. 6A:14-4.8, which do not include expulsion, pursuant to N.J.A.C. 6A:16-7.5.

Specifically, in each instance of short-term suspension, pursuant to N.J.A.C. 6A:16-7.2, and long-term suspension, pursuant to N.J.A.C. 6A:16-7.3, the district board of education is required to provide educational services within five school days of the suspension,

pursuant to N.J.A.C. 6A:16-7.2(a)5 and 7.3(a)8. In each instance of expulsion, pursuant to N.J.A.C. 6A:16-7.5(a), the district board of education may discontinue the educational services or discontinue payment for the educational services.

18. COMMENT: The commenter recommended that the definition of “Removal” be reinstated since the term is used in many of the other definitions. **(10)**

RESPONSE: The department disagrees that the definition of “Removal” should be reinstated. The term “Removal” was previously defined because removal was a separate class of student exclusion from school in Chapter 16, Programs to Support Student Development. The anticipated adoption of the rules on short-term suspension, long-term suspension and expulsion create three new and discrete categories of student exclusions from school, and eliminates removal as a category of exclusion. As such, all suspensions and expulsions are removals of students from school. Therefore, in the proposed rules, a separate definition is not necessary since the common meaning of the term “removal” (i.e., the act of changing the location, position or station) applies, and only in the context of the applicable rules. Additionally, a separate definition for “removal,” absent a separate category of student exclusions titled “removal,” would be confusing.

19. COMMENT: The commenter asked what is meant by mechanisms in N.J.A.C. 6A:16-1.4(a). The commenter stated that boards of education are familiar with approving policies, procedures and programs, but unclear what is meant by mechanisms. **(10)**

RESPONSE: The term “mechanism,” in the context of N.J.A.C. 6A:16-1.4(a), refers to having structures and systems in place for carrying out the required policies, procedures or programs. “Mechanism” refers to a physical process or technique for achieving a result. For example, N.J.A.C. 6A:16-8, Intervention and Referral Services, requires the establishment of a “coordinated system” and the use of a “multidisciplinary team approach,” both of which extend beyond policies, procedures or programs, and would be considered mechanisms for carrying out the provisions of N.J.A.C. 6A:16-8. Therefore, a mechanism extends beyond a plan, procedure or program that may exist primarily on paper or for which there are no structures or systems in place for implementation that are well-established, regularly implemented and familiar to all appropriate school staff.

It is noteworthy that the use of the term in the context of school safety, proposed at N.J.A.C. 6A:16-5.1(a), and emergency and crisis management plans is not new. Pursuant to the existing rules at N.J.A.C. 6A:16-5.2(a), district boards of education have been responsible for establishing these types of mechanisms since May 2001.

20. COMMENT: The commenter recommended that N.J.A.C. 6A:16-1.4(a)16 be amended to state “Prohibition with exceptions,” to more closely mirror the statute. **(10)**

RESPONSE: The department disagrees with the commenter’s suggestion for amending the rule regarding remotely activating paging devices, pursuant to N.J.A.C. 6A16-1.4(a)16. This rule is consistent with the authorizing statute, N.J.S.A. 2C:33-19.

21. COMMENT: The commenter recommended that N.J.A.C. 6A:16-1.4(c), which references the federal requirements for student surveys, also include the citation for the state requirements for surveys at N.J.S.A. 18A:36-34. **(10)**

RESPONSE: The department agrees that N.J.S.A. 18A:36-34 should be referenced in N.J.A.C. 6A:16-1.4(c) since it also applies. Therefore, the department will propose the following amendment, which includes citations regarding student testing, studies or surveys, during the comprehensive review of the provisions in N.J.A.C. 6A:16 that will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-1.4(c)

(c) “Each district board of education that engages in student testing, studies or surveys shall assure that its procedures and materials meet the Federal requirements of [34 CFR Part 98 titled Protection of Pupil Rights.]20 USC § 1232h and N.J.S.A. 18A:36-34 titled School surveys, parent consent required before administration.”

SUBCHAPTER 5. SCHOOL SAFETY

22. COMMENT: The commenter recommended the following language be added to N.J.A.C. 6A:16-5.1(a):

(a) Each district board of education shall develop, adopt and implement comprehensive plans containing procedures and mechanisms that provide for safety in the public elementary and secondary schools under its control. The plans, which shall be in written form, shall, at a minimum, provide for...”

The commenter explained that the term “adopt” added to the first line clarifies that the plan should be voted on by the district board of education prior to implementation. The term “under its control” clarifies that charter schools, for instance, are responsible for their own plans and that boards of education have no responsibility for them even though they may be within the geographic boundary of a school district. The procedures and mechanisms are part of the plan and should not be separate from the plan. The other changes are made for readability purposes. **(10)**

RESPONSE: The department disagrees with the commenter’s recommendations regarding N.J.A.C. 6A:16-5.1(a). It is not necessary, nor may it be appropriate or practical for district boards of education to formally adopt all plans, procedures and mechanisms, pursuant to N.J.A.C. 6A:16-5.1, that may need to change on a regular basis as a result of ongoing consultations with law enforcement agencies, health and social services provider agencies, emergency management planners and other school and community resources, as appropriate. The term, “under its control,” is not necessary

since charter schools, by law, are considered individual school districts, and are not under the authority of district boards of education of public school districts.

The terms “plans,” “procedures” and “mechanisms” have different meanings in the context of the school safety plan. Plans refer to a global formulation of a program of action and an orderly arrangement of parts of an overall goal, objective or design, which may or may not include general or specific procedures. The term, “procedures” is used separately to assure that the school district has in place step-by-step actions to be taken in specified circumstances to achieve the plan or that are consistent with the plan. The term, “mechanisms” is used separately to assure that the district has in place specific structures or systems for carrying out the required plans and procedures in times of crises and emergencies. The other changes proposed by the commenter do not significantly enhance or change the meaning of the rules.

23. COMMENT: The commenter recommended that N.J.A.C. 6A:16-5.1(d) should state: “consistent with the district board of education’s plans” rather than “consistent with the school district’s plans.” The commenter stated that the term “district board of education” has been defined in N.J.A.C. 6A:16-1.2 as applying to more than just the local school board. **(10)**

RESPONSE: The department agrees, since it is the district board of education’s responsibility to develop and provide in-service training for its employees. Therefore, the department will propose the following amendment, which replaces the term “school district’s” with the term “district board of education’s,” during the comprehensive review of the provisions in N.J.A.C. 6A:16 that will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-5.1(d)

“(d) The district board of education shall develop and provide an in-service training program for district board of education employees to enable them to recognize and appropriately respond to safety concerns, including emergencies and crises, consistent with the [school district’s] district board of education’s plans, procedures and mechanisms for school safety and the provisions of N.J.A.C. 6A:16-5.1.”

24. COMMENT: The commenter recommended that N.J.A.C. 6A:16-5.1(d)2 state: “The school safety plan and its in-service training program shall be reviewed by the district board of education on an annual basis and updated as needed.” The commenter explained that the recommended language is a logical extension, such that the reviewer not only looks at the training, but looks at the plan that the training is based on. **(10)**

RESPONSE: The department agrees that the in-service training program should be reviewed annually, but does not agree with the proposed language and with the placement of the recommendation. Consistent with the intent of the suggestions, the department will propose the following amendments during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C.

6A:16, to establish at N.J.A.C. 6A:16-5.1(b)2 that the plans, procedures and mechanisms must be reviewed annually and updated, as appropriate, and to establish at N.J.A.C. 6A:16-5.1(d)2 that the in-service training program must be reviewed annually updated, as appropriate.

N.J.A.C. 6A:16-5.1(b)2

“2. The plans, procedures and mechanisms shall be reviewed annually and updated, as appropriate.”

N.J.A.C. 6A:16-5.1(d)2

“2. The in-service training program shall be reviewed annually and updated [on an annual basis] as appropriate.”

25. COMMENT: The commenter stated that in N.J.A.C. 6A:16-5.3(d), the board of education should also have access monthly to the number and disposition of reported acts of violence. **(10)**

RESPONSE: The district boards of education are already entitled to have access to the number and disposition of reported acts of violence, pursuant to N.J.S.A. 18A:17-46. While N.J.S.A. 18A:17-46 and N.J.A.C. 6A:16-5.3 require that district boards of education receive this information from the chief school administrator annually at a public hearing, district boards of education may request these reports at any time. N.J.A.C. 6A:16-5.3(d) has been proposed to conform to the authorizing statute at N.J.S.A. 18A:47-46.

26. COMMENT: The commenter asked for clarification of N.J.A.C. 6A:16-5.3(d). Specifically, the commenter asked why “personal identifying information” is being shared with the majority representative. If this refers to the personal identifying information of pupils, why would the majority representative need the information? The commenter stated that this seems an unnecessary breach of pupil confidentiality. **(10)**

RESPONSE: The department disagrees that the rule at N.J.A.C. 6A:16-5.3(d) is an unnecessary breach of student confidentiality. School administrators have the obligation to protect the health, safety and welfare of *all* of the adults and students in schools, the school facilities and the educational process. If administrators have reason to believe that the safety of a school staff member is at risk, the administrator has an obligation to take steps to protect the staff member, including providing identifying information pursuant to N.J.A.C. 6A:16-5.3.

Additionally, for professional staff the Family Educational Rights Privacy Act, 34 CFR Part 99.31, permits the release of personally identifying student information, without consent, to school officials and teachers, within the school, whom the school has determined to have legitimate interests in having the information. The protection of the safety of one’s person or effects is a legitimate interest.

27. COMMENT: The commenter asked who is providing the money for the training of staff cited in N.J.A.C. 6A:16-5.3(e). **(10)**

RESPONSE: The training required in N.J.A.C. 6A:16-5.3(e) does not impose new costs or requirements on district boards of education. The training has been mandated since 2002, pursuant to N.J.S.A. 18A:17-46, which specifically requires boards of education to provide ongoing staff training in fulfilling the reporting requirements pursuant to N.J.S.A. 18A:17-46 and N.J.A.C. 6A:16-5.3.

The department has provided and plans to continue to provide training in the reporting requirements at no cost to school staff. However, since the parameters of the in-service training are at the discretion of the school district, each district board of education may budget Federal, State or local funds, as appropriate, to provide the in-service training, pursuant to proposed N.J.A.C. 6A:16-5.3(e).

28. COMMENT: The commenter asked who will fund the preparation of the hearing transcript cited in N.J.A.C. 6A:16-5.3(f)1. **(10)**

RESPONSE: In any given fiscal year, the department will make funds available to district boards of education, subject to state appropriations, for the transcripts, pursuant to N.J.S.A. 18A:17-46 and N.J.A.C. 6A:16-5.3(f)1.

29. COMMENT: The commenter asked if the implementation of the violence corrective action plan in N.J.A.C. 6A:16-5.3(i) is tied to the persistently dangerous schools requirement under the Federal No Child Left Behind Act. The commenter recommended that a reference be included if N.J.A.C. 6A:16-5.3(i) is tied to schools identified as persistently dangerous by the Department of Education. **(10)**

RESPONSE: The corrective action plan referenced in proposed N.J.A.C. 6A:16-5.3(i), in part, is tied to the department's Unsafe School Choice Option (USCO) Policy, which was developed pursuant to the No Child Left Behind Act (20 U.S.C. 7912) and adopted by the State Board of Education by resolution. The Federal statute is not cited, however, because the department's USCO Policy would exist independent of the Federal statute and could remain in effect after the No Child Left Behind Act expires. Apart from the No Child Left Behind Act requirements, the USCO Policy and the proposed rule are intended to provide a vehicle for addressing high incidences of violence, vandalism and substance in New Jersey schools.

30. COMMENT: The commenter stated that N.J.A.C. 6A:16-5.5(b) and 5.5(d), 5.6(b) and (d), and 5.7(b) and (d) require an immediate removal imposed by the principal, but fail to afford students minimal due process procedures for suspension of ten days or less, which are mandated by *Goss*. **(8)**

RESPONSE: The department disagrees. The appropriate due process rights for firearms offenses under N.J.A.C. 6A:16-5.5 are set forth in N.J.A.C. 6A:16-

5.5(d)5iv, as authorized under N.J.S.A. 18A:37-8. The appropriate due process rights for assaults with weapons offenses under N.J.A.C. 6A:16-5.6 are set forth in N.J.A.C. 6A:16-5.6(d)5iv, as authorized under N.J.S.A. 18A:37-24. As described by the commenter, the due process procedures established under *Goss v. Lopez*, 419 U.S. 565 at 580-582 apply only to suspensions of ten days or fewer. Therefore, the provisions of *Goss* do not apply to these offenses, since by law the removals under N.J.A.C. 6A:16-5.5 are for one calendar year, at a minimum, and the removals under N.J.A.C. 6A:16-5.6 are for one calendar year, at a maximum. Both statutes require district boards of education to impose long-term suspensions on student offenders, subject to a case-by-case modification of the removal by the chief school administrator. It is noted, however, that the protections recognized in *Goss* are included in N.J.A.C. 6A:16-7.2, Short-term suspensions.

31. COMMENT: The commenter stated that the proposed regulations exclude students with disabilities from certain procedural safeguards that apply to general students. The commenter specifically cited the definitions of “short-term-suspensions” and “long-term suspensions” stating that the definitions suggest that children with disabilities are subject to different procedures than those set forth in N.J.A.C. 6A:14-2.8, which do not include a full set of procedural protections. The commenter stated that a different set of procedures is also referenced in certain provisions including 5.5(b) and 5.6(b), 5.5(d)5iv and 5.6(d)5iv, 5.5(e), 5.6(e) and 5.7(e), 5.5(f) and 5.6(g). The commenter stated that the regulations must make clear that students with disabilities be provided no less support than other students. (8)

RESPONSE: The department agrees that the proposed rules must make clear that students with disabilities are provided no less protection and support than other students. The rules at N.J.A.C. 6A:16-5.5(d)5iv and 5.6(d)5iv establish that students with disabilities are afforded the same due process rights (N.J.A.C. 6A:16-7.2 through 7) as general education students as well as those set forth for special education students in N.J.A.C. 6A:14-2.7 through 2.8. The due process rights granted to general education students at N.J.A.C. 6A:16-5.7(e) may or may not apply to students with disabilities in particular circumstances, since the appropriate response and applicable due process rights depend upon the time period and particular circumstances of the student removals.

32. COMMENT: The commenter stated that N.J.A.C. 6A:16-5.5(c), 5.6(c) and 5.7(c) are violations of the IDEA. The commenter declared that the IDEA prohibits the disciplinary exclusion of children with disabilities whose misconduct is a manifestation of their disability and stated that these regulations cannot violate the right to be free from discriminatory discipline. The IDEA 2004 will allow the temporary removal to an interim alternative education setting, but does not require removal and does not permit removal to last for more than 45 days. Additionally, the commenter stated that the new disciplinary provisions of IDEA support individualized decision-making and states “school personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.” The commenter stated that any mandatory removal of a child with a disability from his or her educational program for any offense would violate these provisions. (8)

RESPONSE: The department disagrees that N.J.A.C. 6A:16-5.5(c), 5.6(c) and 5.7(c) violate the Individuals with Education Disabilities Act. The rules in N.J.A.C. 5.5(c), 5.6(c) and 5.7(c) are clear that removals involving students with disabilities must be handled in accordance with the rules at N.J.A.C. 6A:14 and the applicable Federal regulations incorporated therein.

33. COMMENT: The commenter stated that N.J.A.C. 6A:16-5.5 and 5.6 do not provide comparable language for children with disabilities to be returned immediately to the program from which they were removed if they are found not guilty of the relevant violation. Additionally, the commenter stated that the language in N.J.A.C. 6A:16-7.3(a)11 is similar to the language in 7.3(a)12, except there is no guarantee that the student with a disability can return to the program or placement from which they were removed. (8)

RESPONSE: The department disagrees. The rules proposed at N.J.A.C. 6A:16-5.5(h) and 5.6(h) stipulate that if it is found that removed students are not guilty of the respective offenses, the students shall be immediately returned to the program from which they were removed. The provision does not distinguish between general education and special education students and, therefore, applies to both general education and special education students.

The department also disagrees that N.J.A.C. 6A:16-7.3(a)12 should be amended to require in all cases of conduct problems for students with disabilities that they return to the program or placement from which they were removed, as is the case for general education students pursuant to N.J.A.C. 6A:16-7.3(a)11. Changes to students' Individualized Education Programs (I.E.P.) are based on the determinations of I.E.P. teams.

34. COMMENT: The commenter stated that pursuant to N.J.A.C. 6A:16-5.5(i), 5.6(i) and 7.3(c) through (g), children with disabilities are not provided with the protections available to general education students. The commenter stated that in some instances, if the district board of education proceeded under N.J.A.C. 6A:14-2.8 in determining, altering or changing the students educational placement to an "interim alternative educational setting," it would only apply to a small amount of students with disabilities suspended from school. The commenter stated that N.J.A.C. 6A:14-2.8 does not discuss when or how the suspension of a student with a disability should be terminated, and stated that IEP teams do not have the authority comparable to the district board of education or chief school administrator to terminate a suspension and permit a student to return to his original program. (8)

RESPONSE: The department disagrees that students with disabilities are not provided with the protections available to general education students in N.J.A.C. 6A:16-5.5, 5.6 and 7.3. The rules do not provide separate or unequal protections. N.J.A.C. 6A:16-5.5 (d)5iv, 5.6(d)5iv and 7.3(a)4, 7.3(a)6, 7.3(a)8, 7.3(g)1 and 7.3(h) are clear that students with disabilities are provided with the same protections available to

general education students as well as the protections available to students with disabilities in N.J.A.C. 6A:14.

The commenter's concerns regarding N.J.A.C. 6A:14-2.8 in determining, altering or changing the students educational placement to an "interim alternative educational setting; when or how the suspension of a student with a disability should be terminated; and the authority of IEP teams, comparable to the district board of education or chief school administrator, to terminate a suspension and permit a student to return to his original program should be addressed in the special education rules. The amended special education rules are scheduled for presentation to the State Board of Education at First Discussion Level in the fall of 2005. The department will consider the comments during the comprehensive review of the provisions in N.J.A.C. 6A:14, Special Education, which is scheduled for presentation to the State Board of Education at First Discussion Level in the fall of 2005.

35. COMMENT: The commenter stated that the student conduct regulations include procedures applicable to children with disabilities subject to long-term suspensions or removals. The commenter recommended that procedures, in addition to all procedures available to general education students, include special procedures related to manifestation determinations, functional behavioral assessments and behavior intervention plans, placement and services of students during short-term suspensions, placement and services of students during long-term suspensions and removals, temporary placement of students under certain limited circumstances in interim alternative education settings, and procedures related to return to their original placement or programs after a period of suspension or removal from school. **(8)**

RESPONSE: The department disagrees that the commenter's concerns should be addressed in N.J.A.C. 6A:16-7, Student Conduct. The commenter's concerns are best addressed in the special education rules. Therefore, the department will consider the comments during the comprehensive review of the provisions in N.J.A.C. 6A:14, Special Education, which is scheduled for presentation to the State Board of Education at First Discussion Level in the fall of 2005.

36. COMMENT: The commenter referenced the removal of the phrase "property used for school purposes" and the replacement with the phrase "school grounds, including on a school bus or at a school sponsored function" in N.J.A.C. 6A:16-5.8(b) and (c). The commenter stated that "Property used for school purposes" is the language used in the statute, N.J.S.A. 2C:33-19 and to use any other language is to go beyond the statutory authority in the law. **(10)**

RESPONSE: The department disagrees that the use of the phrase "school grounds, including on a school bus or at a school sponsored function" in N.J.A.C. 6A:16-5.8(b) and (c), rather than the phrase, "Property used for school purposes," exceeds the statutory authority under N.J.S.A. 2C:33-19. The definition of school grounds in N.J.A.C. 6A:16-1.3 is consistent with the intent of the phrase, "Property used for school purposes,"

in N.J.S.A. 2C:33-19, in that the definition is limited to property used for school purposes.

37. COMMENT: The commenter recommended that the State Board address if a cell phone is considered a remote paging device. **(10)**

RESPONSE: The department disagrees with the recommendation, since, to date, the authorizing statute, N.J.S.A. 2C:33-19, only addresses remotely activating paging devices. Accordingly, any device used in the conditions set forth in N.J.S.A. 2C:33-19 and N.J.A.C. 6A:16-5.8 must be considered a remotely activating paging device.

SUBCHAPTER 6. LAW ENFORCEMENT OPERATIONS FOR SUBSTANCES, WEAPONS AND SAFETY

38. COMMENT: The commenter expressed concern about N.J.A.C. 6A:16-6.1(a)2. The commenter referenced the *Uniform State Memorandum of Agreement between Education and Law Enforcement Officials* and stated that the term “school property” is used throughout the agreement. In the proposed regulations the term “school property” appears to be unilaterally expanded to “school grounds, including on a school bus or at a school sponsored function.” The commenter stated that the expanded definition is not currently reflected in the uniform memorandum and may lead to confusion among school districts and law enforcement. **(10)**

RESPONSE: The proposed amendments to the rules will necessitate consideration of commensurate changes in the *Uniform State Memorandum of Agreement between Education and Law Enforcement Officials*. The revisions to the *Memorandum of Agreement* are being addressed by the Attorney General’s Education and Law Enforcement Working Group subsequent to the adoption of the proposed rules.

39. COMMENT: The commenter requested that the department establish guidelines for assisting chief school administrators regarding the determinations required under N.J.A.C. 6A:16-6.3(a)4. The commenter stated that explicit guidelines are required to make clear the parameters of the regulation to both school administrators and prosecutors. The commenter also stated that school officials are educators, and should not be utilized as an extension of law enforcement. **(9)**

RESPONSE: The department disagrees that the department should establish guidelines for making determinations proposed at N.J.A.C. 6A:16-6.3(a)4. Pursuant to N.J.S.A. 18A:40A-15(b), affirmed in Gracefo v. School District of the Township of Wayne, Passaic County, OAL DKT. NO. EDU 5619-99 and AGENCY DKT NO. 113-5/99, each district board of education is required to assure that all teaching staff members are provided with in-service training for the recognition of, response to and referral of substance abuse.

Additionally, N.J.A.C. 6A:16-6.3 does not require the utilization of school officials as an extension of law enforcement. As required under N.J.S.A. 18A:37-6, the State Board of Education, in consultation and cooperation with the Attorney General, is required to adopt rules and regulations regarding law enforcement operations on school grounds and the reporting of suspected offenses and acts of delinquency to law enforcement. As set forth in N.J.A.C. 6A:16-6.1, the rules at N.J.A.C. 6A:16-6, Law Enforcement Operations for Substances, Weapons and Safety are established to ensure cooperation between school staff and law enforcement officials in instances involving drugs and violence. Since it is the obligation of school officials to protect the health, safety and welfare of the educational process, school facilities and the people in them, and there are instances when the services of law enforcement officials are necessary to protect the health, safety and welfare of the educational process, school facilities and the people in them, N.J.A.C. 6A:16-6, in general, and N.J.A.C. 6A:16-6.2(b)13, in particular, establish the policies and procedures and reciprocal rights and obligations of students, parents, school staff and law enforcement officials in protecting the school and its interests in the incidences of substances, violence and other delinquent behavior, pursuant to N.J.A.C. 6A:16-6.

40. COMMENT: The commenter stated that the determination of what constitutes “reasonable belief” in N.J.A.C. 6A:16-6.3(a)4 may vary significantly among various counties. The commenter recommended the establishment of guidelines to provide parameters for making the determination of whether there is a reasonable belief that the student is in possession of illegal drugs, paraphernalia, or involved in distribution. (9)

RESPONSE: The department disagrees that guidance or parameters should be provided for determining “reasonable belief.” The department defers to the special considerations regarding reasonableness set forth in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The United States Supreme Court concluded that, while the Fourth Amendment applies to their conduct, teachers and school administrators need not follow the strict procedures of “probable cause,” an elusive concept, governing police activity, but instead, the legality of their actions depends upon “reasonableness” or “common sense” under all attending circumstances known to school officials.

The Court goes on to explain that the standard of reasonable grounds is not one which requires either absolute certainty or proof beyond a reasonable doubt. Nor does it require the level of proof necessary before which a school official could actually impose a disciplinary sanction. Consequently, a teacher or school administrator can entertain an act upon a perfectly legal suspicion which ultimately turns out to be mistaken. Reasonableness is a common sense approach that does not require direct evidence of an infraction or comprehensive or rigid guidelines, but takes into account all of the attendant circumstances in each individual case. Additionally, the guidance provided by the Court on the issue of reasonable grounds is particularly instructive when applied to the issue of suspected student use of substances, since an even lesser standard of evidence (i.e., “to whom it appears that a student may be currently under the influence of alcohol or other drugs...”) is established in N.J.S.A. 18A:40A-12 and N.J.A.C. 6A:16-4.3(a)1 in these instances.

The Court's determinations and considerations in *New Jersey v. TLO* were incorporated into *The New Jersey School Search Policy Manual* developed by the Attorney General's Office. The manual has been provided to school districts and guided their decisions of reasonableness for the past six years.

41. COMMENT: The commenter requested clarification of N.J.A.C. 6A:16-6.3(a)4. The commenter referenced the *Uniform State Memorandum of Agreement between Education and Law Enforcement Officials*, Article 4 Section 4.1 which states that school officials will promptly notify law enforcement authorities whenever the employee has reason to believe a violation of the Comprehensive Drug Reform Act has occurred. The commenter expressed concern that the provision seems to make it permissive for the chief school administrator to disclose the names of pupils referred for being suspected of being under the influence, which contradicts the Memorandum of Agreement. (10)

RESPONSE: The proposed amendments to the rules will necessitate consideration of commensurate changes in the *Uniform State Memorandum of Agreement between Education and Law Enforcement Officials*. The revisions to the *Memorandum of Agreement* are being addressed by the Attorney General's Education and Law Enforcement Working Group subsequent to the adoption of the proposed rules.

SUBCHAPTER 7. STUDENT CONDUCT

42. COMMENT: The commenter requested that the code of student conduct regulations incorporate detailed, explicit and substantive standards governing suspensions and expulsions. The commenter stated that this is necessary to protect the rights of students to a thorough and efficient education and to ensure at least a minimal level of consistency among school districts throughout the state. (8)

RESPONSE: The department agrees that the department's student conduct regulations should incorporate detailed, explicit and substantive standards governing suspensions and expulsions and that this has been accomplished through the proposed regulations. Specifically, the establishment of codes of student conduct by district boards of education must be based on the following requirements and parameters: involvement of parents, students and community members, who are representative of the composition of the schools and community, in the development, pursuant to N.J.A.C. 6A:16-7.1(a)1, and the annual review and update, pursuant to N.J.A.C. 6A:16-7.1(a)3, of the code of student conduct; the code of student conduct must be based on locally determined and accepted core ethical values adopted by the district board of education, pursuant to N.J.A.C. 6A:16-7.1(a)2; the code of student conduct must be consistent with the purposes identified in N.J.A.C. 6A:16-7.1(b); and the code of student conduct must include the minimum components established in N.J.A.C. 6A:16-7.1(c), which includes expectations and responsibilities for student achievement, behavior and attendance, a description of behaviors that will result in suspension or expulsion, and a description of school responses to violations of the behavioral expectations. Under these regulations, it

is the district board of education's responsibility to link the purposes of the code of student conduct to disciplinary sanctions.

The department, however, disagrees that it is possible or desirable to provide more specificity in regulations regarding the individual acts or types of acts that warrant statewide consistent responses, such as suspension, expulsion or alternative education, beyond the causes set forth in N.J.S.A. 18A:37-2. The only behaviors that rise to the level of requiring a uniform statewide disciplinary and alternative education response are those established by federal and state law (i.e., firearms offenses, pursuant to 20 USC 7151, N.J.S.A. 18A:-37-8; assaults with weapons offenses, pursuant to N.J.S.A. 18A:37-2.2; and assaults on district board of education members or employees, pursuant to N.J.S.A. 18A:2.1). As acknowledged in N.J.A.C. 6A:16-7.1(c)5, districts must have latitude in their responses to violations of their locally established behavioral expectations that are graded according to the severity of offenses and that consider the developmental ages of the student offenders and students' histories of inappropriate behaviors, while receiving due process of law, pursuant to N.J.A.C. 6A:16-7.2, 7.3 and 7.5, as appropriate. Consistency is achieved by the establishment of regulations that provide uniform standards, criteria and parameters for the institution and enforcement of locally determined codes of student conduct. This approach, for example, is analogous to the Core Curriculum Content Standards (CCCS), pursuant to N.J.A.C. 6A:8, in which a uniform curriculum is not imposed on district boards of education, but rather the CCCS regulations set forth the instructional objectives to be achieved by district boards of education and give district boards of education the responsibility for determining the best curriculum and pedagogy for achieving the CCCS and providing students with the constitutionally mandated system of "thorough" public school instruction.

43. COMMENT: The commenter recommended that the Department of Education review each district board of education's proposed code of student conduct prior to implementation and include a determination that the district has complied with the requirement to include the input of students, parents and the community. The commenter stated that the pre-implementation review process would ensure that the district board of education is in compliance with the minimal requirements set out by Subchapter 7. (11)

RESPONSE: The department disagrees. It is the obligation of the district boards of education to comply with the rules. The review of compliance with N.J.A.C. 6A:16-7 will take place as part of department monitoring of the school districts.

44. COMMENT: The commenter recommended that the first sentence of N.J.A.C. 6A:16-7.1(a) state: "Each district board of education shall develop, adopt, and implement a code of student conduct..." to clarify that the code of student conduct must have board approval prior to implementation. (10)

RESPONSE: The department agrees, since its intention is that the district board of education adopt the code of student conduct. The department will propose the following amendment during the comprehensive review of the provisions in N.J.A.C.

6A:16, which will take place during the readoption of N.J.A.C. 6A:16, to establish that each district board of education must adopt the code of student conduct:

N.J.A.C 6A:16-7(a)

“(a) Each district board of education shall develop, adopt and implement a code of student conduct which establishes standards, policies and procedures for positive student development and student behavioral expectations on school grounds, including on a school bus or at school-sponsored functions, and, as appropriate, for conduct away from school grounds, in accordance with N.J.A.C. 6A:16-7.6.”

45. COMMENT: The commenter stated that the language in N.J.A.C. 6A:16-7.1(a)1 should provide examples of how parent, student and community involvement can best be achieved. The commenter provided examples, including the inclusion of positions on committees charged with the development of codes for students, parents and interested community members; open meetings prior to the initial drafting of codes to hear community concerns and ideas; and a review process for parents, students and interested community members. **(11)**

RESPONSE: The department disagrees that the rules should provide examples of how parent, student and community involvement can best be achieved. The information requested is best addressed through written guidance and professional development programs for school staff. The department will provide training designed to provide guidance on the new rules in N.J.A.C. 6A:16, subsequent to the readoption of N.J.A.C. 6A:16.

46. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.1(a)2 state: “The code of student conduct adopted by the district board of education shall be based on locally determined and accepted core ethical values.” The commenter stated that without the suggested language, N.J.A.C. 6A:16-7.1(a)2 sounds like a board is to adopt its values first and then come up with the code of student conduct, instead of the code of student conduct being the embodiment of the values. **(10)**

RESPONSE: The department disagrees that the language in N.J.A.C. 6A:16-7.1(a)2 should be revised, since it would change the meaning and intent of the proposed provision. The department will propose to amend N.J.A.C. 6A:16-7.1(a) during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16, to make it clear that the code of student conduct must be “adopted” by the district board of education. However, no amendments will be proposed to N.J.A.C. 6A:16-7.1(a)2, since it is intended to ensure that the code of student conduct is based upon locally determined and accepted core ethical values that are also adopted by the district board of education.

47. COMMENT: The commenter stated that nothing in the regulations address important evidentiary issues, such as clearly establishing that the burden of proof

is on the district and that the district should establish rules to prohibit decisions based on hearsay evidence. (8)

RESPONSE: The department disagrees that the regulations should establish that the burden of proof for student conduct actions is on the district board of education, since N.J.A.C. 6A:16-7.1(c)5iii provides for the equitable application of the code of student conduct. However, the department agrees that the regulations should include guidance on the relationship between evidence and district board of education determinations on violations of the code of student conduct, and will propose the following amendment to N.J.A.C. 6A:16-7.3(a)9 as part of the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16, to establish that the formal hearing before the district board of education must result in a decision that is based, at a minimum, on the preponderance of competent and credible evidence:

- iv. Not be subject to the provisions of the "Open Public Meetings Act," pursuant to N.J.S.A. 10:4-6; and
- v. Result in a decision by the district board of education which, at a minimum, shall be based on the preponderance of competent and credible evidence.

48. COMMENT: The commenter stated that a provision must be made for what happens to a student recommended for a long-term suspension or expulsion. The commenter stated concern that the proposed regulations at N.J.A.C. 6A:16-7.3 do not address what happens to a student between the tenth day of a suspension and a hearing. The commenter stated that unless nothing more than an initial *Goss* type hearing is provided, a student may not be suspended for more that ten days pending a formal hearing. (8)

RESPONSE: The department disagrees that the proposed regulations at N.J.A.C. 6A:16-7.3 do not address what happens to a student between the tenth day of a suspension and a hearing. N.J.A.C. 6A:16-7.2 and 7.3 establish that removed students must be provided with comparable educational services within five days of the suspension. Additionally, the thirty-day time period for the hearing was established in N.J.S.A. 18A:37-2.4 and N.J.S.A. 18A:37-10, which were adopted *after* both the rulings in *Goss v. Lopez*, 419 U.S. 565 at 580-582 and *R. R. v. Bd. of Ed. of Shore Regional High Sch. District*, 109 N.J. Super. 346, (Ch. Div. 1970). The thirty-day time period for a hearing established in these statutes applies to some of the most egregious student offenses: firearms and assaults with weapons. Applying a lesser time period for all other offenses warranting a long-term suspension or expulsion would unreasonably impose a more stringent due process requirement for lesser offenses, and using different time periods for various offenses would cause unnecessary confusion regarding the application of due process rights. As a final point, the thirty-day time period is consistent with the meeting schedule of district boards of education.

49. COMMENT: The commenter stated that proposed 7.2(a)1 through 5 should clearly and separately state that before a student may be suspended, except for situations in which the student must be immediately removed from school because the student's presence poses a continuing danger, the district must provide the student with oral or written notice of the charges and an informal hearing at which the student is given an opportunity to present the student's side of the story regarding the charge. The commenter stated that the regulation loses clarity and force by grouping together procedures (a)1 and 2 which are required under *Goss v. Lopez* and procedures (a)3 through 5 which must be provided but are not required as a matter of due process. (8)

RESPONSE: It is the position of the department that N.J.A.C. 6A:16-7.2(a)1 and (2) are consistent with *Goss v. Lopez*, 419 U.S. 565 at 580-582. N.J.A.C. 6A:16-7.2(a)1 states that oral or written notice of charges to the student and the student's parents must be provided as soon as practicable. N.J.A.C. 6A:16-7.2(a)2 establishes that the informal hearing must occur prior to the suspension and the student must be given the opportunity to present the student's side of the story. N.J.A.C. 6A:16-7.2(a)2iv makes clear that the informal hearing and notice may take place at the same time. N.J.A.C. 6A:16-7.2(a)2ii establishes the only circumstances when a student may be immediately removed from the student's educational program without a hearing; but the regulation makes clear that the informal hearing in these instances must occur as soon as practical after the suspension.

While the proposed regulations are consistent with *Goss*, the department agrees that they could more clearly establish that the notice of charges must be provided prior to a short-term suspension. The department will propose amendments to clarify the point as part of the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16.

The department disagrees that the regulations lose clarity and force by grouping together the procedures at N.J.A.C. 6A:16-7.2(a)1 and 2, which are required under *Goss*, and the procedures at N.J.A.C. 6A:16-7.2(a)3 through 5. On the contrary, it is the department's position that maximum clarity and force are provided to district boards of education and school administrators by locating in one place all of the due process requirements for short-term suspensions, pursuant to N.J.A.C. 6A:16-7.2(a)1 through 5. In this way, all required due process procedures, which the commenter states exceed the findings in *Goss*, are codified and organized for ease of reference and use.

50. COMMENT: The commenters stated that N.J.A.C. 6A:16-7.2(a)1 is confusing because it combines notice to the student and notice to the parent in one subsection. In addition, 7.2(a)1 does not provide adequate direction to the district with respect to the content of written notice to the parent. The commenter recommended that the notice include: 1) the charges, including reference to code allegedly violated, a description of the alleged misconduct; 2) the underlying facts, evidence and names of witnesses of the alleged misconduct; 3) the term and conditions of the suspension, including duration; 4) the date and time of the informal hearing 5) the right to appeal the suspension at the school site or district level; 6) the right to appeal the suspension to the

Commissioner; 7) information regarding the district's code of conduct; 8) the school's plan for meeting the educational services requirements during the suspension, as appropriate; 9) referrals to organizations where the parents may obtain free legal assistance; and 10) a time parameter in regard to parental notice of a short-term suspension (i.e., the regulations should state that notice is to be given no later than the end of the day); and 11) a statement giving parents the opportunity to change the time of the informal hearing to a mutually convenient time. **(8, 11)**

RESPONSE: The department agrees that the requirement to notify parents of charges could be more appropriately placed in another section to make clear that parent notification is not a requirement for conducting an informal hearing with a student. The department also agrees that the parent notification requirement should include the minimum contents of the notification required to provide consistency across school districts, while avoiding unnecessary paperwork. The contents should include only the following minimum due process provisions: an explanation of the charges against the student, the evidence forming the basis of the charges, the provision(s) of the code of student conduct the student is accused of violating, the terms and conditions of the suspension and time parameters for the notification. Therefore, the department will propose the following amendments to N.J.A.C. 6A:16-7.2(a)1 and N.J.A.C. 6A:16-7.2(a)3, to separate the parent notification requirements from student notification requirements and to establish criteria for the notification to parents, as part of the comprehensive review of the provisions in N.J.A.C. 6A:16 that will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-7.2(a)

1. As soon as practicable, oral or written notice of charges to the student, [and the student's parents.]
3. Oral or written [Notification]notification to the student's parents of the student's removal from the student's educational program prior to the end of the school day on which the school administrator makes the decision to suspend the student[;], which shall include an explanation of:
 - i. The specific charges;
 - ii. The facts on which the charges are based;
 - iii. The provision(s) of the code of student conduct the student is accused of violating;
 - iv. The student's due process rights, pursuant to N.J.A.C. 6A:16-7.2 through 7.6; and
 - v. The terms and conditions of the suspension;

In addition, school authorities must not be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. The interests of schools are not served by requiring school officials to permit appeals for every short-term suspension that is imposed on students. Furthermore, the appeal procedures cited in N.J.A.C. 6A:16-7.3(b), Long-term suspensions do not fall under the findings of *Goss*, and the regulations at N.J.A.C. 6A:16-7.3(b) only apply to appeals to the Commissioner of Education regarding district board of education decisions on the student's general education program. Since short-term suspensions result from administrative decisions based on the district board of education's code of student conduct, rather than from formal case-by-case board of education determinations, the appeal procedures to the Commissioner of Education do not apply. It should be noted, however, that while the district board of education has the authority to remove students under N.J.S.A. 18:37-2, Causes for suspension or expulsion of pupils, and N.J.A.C. 6A:16-7.2, Short-term suspensions, parents always have the right to request a review of these matters with school authorities. It is the position of the department that regulations are not required for parents to contact and make appeals to local school officials, particularly in instances of short-term suspensions.

Finally, it is not necessary for district boards of education to refer parents to organizations where they may obtain free legal assistance in each instance of a short-term suspension, or to provide parents with a copy of the code of student conduct in each instance of a short-term suspension. It is sufficient, pursuant to N.J.A.C. 7.1(d), to require district boards of education to annually disseminate the code of student conduct to all students, staff and parents, which, pursuant to N.J.A.C. 7.1(c)8, must include a list of legal resources available to serve the community.

51. COMMENT: The commenter stated that the exception under N.J.A.C. 6A:16-7.2(a)2ii should provide further definition describing the type of behavior which constitutes a "continuing danger or ongoing threat" to ensure consistency throughout the state in regard to the informal hearings. **(11)**

RESPONSE: The department disagrees that further definition should be given in N.J.A.C. 6A:16-7.2(a)2ii describing the type of behavior which constitutes a "continuing danger or ongoing threat." The presence of danger is best determined through consideration of the presenting conditions on a case-by-case basis and the district board of education's school safety plan, pursuant to N.J.A.C. 6A:16-5.1, as appropriate. The information requested by the commenter is best addressed through written guidance and professional development programs for school staff. Guidance has been provided to school districts in the department's publication titled *A Guide for the Development of a Districtwide School Safety Plan*, and all chief school administrators have received instructions on how to access the department's secure publication titled *School Safety Manual: Best Practices Guidelines*.

52. COMMENT: The commenter referenced N.J.A.C. 6A:16-7.2(a)3 and 4 and 7.3(a)1 and 2 and asked what happens if the student's parents are unavailable or do not arrive. **(10)**

RESPONSE: In all cases, the parent is responsible for ensuring appropriate supervision of their children after school hours. The rule at N.J.A.C. 6A:16-7.2(a)3 makes clear that the district's obligation in regard to N.J.A.C. 6A:16-7.2, Short-term suspensions, is to notify parents prior to the end of the school day on which the school administrator makes the decision to suspend the student. The rule at N.J.A.C. 6A:16-7.2(a)4 is clear that the district's obligation in regard to N.J.A.C. 6A:16-7.2, Short-term suspensions, is to provide appropriate supervision of the student only during the school day. Similarly, the rule at N.J.A.C. 6A:16-7.3(a)3 is also clear that the district's obligation in regard to N.J.A.C. 6A:16-7.3(a)1 and (a)2, is to provide appropriate supervision of the student only during the school day.

53. COMMENT: The commenter requested clarification on whether the educational services which must be provided according to N.J.A.C. 6A:16-7.2(a)5, can be provided in-district at an alternative location. **(9)**

RESPONSE: The educational services which must be provided pursuant to N.J.A.C. 6A:16-7.2(a)5 may be provided in-district at an alternative location. N.J.A.C. 6A:16-7.2(a)5 specifies that the educational services can be provided either in school or out of school, and that they must be comparable to those provided in the public schools for students of similar grades and attainments, pursuant to N.J.S.A. 18A:38-25, which may include a public education program provided in accordance with the provisions of N.J.A.C. 6A:16-9 or 6A:16-10. Decisions regarding the provision of the comparable educational services, including location, are made by the district board of education, in accordance with N.J.A.C. 6A:16-7.2 and all other applicable statutes, regulations and case law.

54. COMMENT: The commenter stated that the provisions at N.J.A.C. 6A:16-7.2(a)5 and N.J.A.C. 6A:16-7.3(a)8 extend beyond the authority granted by the Legislature. The commenter stated that in certain circumstances, the Legislature has specified circumstances under which alternative education for students must be provided, but the Legislature does not provide it for all circumstances. In order for alternative education to be provided during short- and long-term suspensions, the change would need to be made legislatively before it can be inserted into the code. **(10)**

RESPONSE: The department disagrees that the provisions at N.J.A.C. 6A:16-7.2(a)5 and N.J.A.C. 6A:16-7.3(a)8 first should be mandated by the Legislature. District boards of education are obligated to provide a free public education for all enrolled students. Decisions regarding the provision of educational services, including location, are made by the district boards of education, in accordance with all applicable statutes, regulations and case law.

55. COMMENT: The commenter stated that the reference to N.J.S.A. 18A:38-25, provided in N.J.A.C. 6A:16-7.2(a)5 and N.J.A.C. 6A:16-7.3(a)8 refers only to "equivalent instruction" and makes no mention of its use for students with short- or long-term suspensions as the reference in the code implies. **(10)**

RESPONSE: The department disagrees with the comments regarding the reference to N.J.S.A. 18A:38-25. N.J.S.A. 18A:38-25 establishes the requirement for parents to ensure that their children regularly attend the public schools of the school district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school. Proposed N.J.A.C. 6A:16-7.2(a)5 and N.J.A.C. 6A:16-7.3(a)8 are clear that the instruction, pursuant to N.J.S.A. 18A:38-25, also must be provided in instances of short- and long-term suspensions, consistent with the State Board of Education decision in P.H. v. Board of Educ. of the Borough of Bergenfield, 2002 S.L.D. July 2.

56. COMMENT: The commenter stated that the provisions at N.J.A.C. 6A:16-7.2(a)5 and N.J.A.C. 6A:16-7.3(a)8 may seem like good policy, however, given the limitations placed on districts through Chapter 73, Public Law 2004, it is an unreasonable and impractical expectation from an administrative perspective that sets up districts for monitoring and student discipline failure. The commenter stated that in the end, student discipline can be challenged or invalidated due to technical noncompliance with the regulations, affecting the safety of all students. Additionally, the commenter stated that the cost of implementing these proposed provisions is a major consideration. Since alternative education is not part of the model school efficiency standards, the legislatively defined “thorough and efficient” education in New Jersey, by which the cost of education is established, the commenter asked how the State Board or the Department of Education proposes that districts implement the proposed provisions. **(10)**

RESPONSE: The department disagrees that the proposed provisions at N.J.A.C. 6A:16-7.2(a)5 and N.J.A.C. 6A:16-7.3(a)8 pose unreasonable and impractical administrative expectations. Section IV of the New Jersey Constitution has established the right of all students in the State to receive a free public education. Additionally, the educational services set forth in the rules are required as a result of the State Board of Education decision in P.H. v. Board of Educ. of the Borough of Bergenfield, 2002 S.L.D. July 2. The proposed rules only provide clarification of the educational requirements of the P.H. decision.

Every student is part of the resident enrollment and districts receive state aid and raise levies to provide them with an education. The efficiency model provides districts with guidelines and is not intended to be prescriptive or account for every possible situation. Districts have the ability to deviate from the model based on their specific circumstances and needs. The fact that all alternative forms of education are not explicitly included in the model does not inhibit districts’ abilities to utilize such programs as needed.

57. COMMENT: The commenter asked if the provision at N.J.A.C. 6A:16-7.2(a)5i means that students who are suspended for less than five days are not entitled to receive services. **(10)**

RESPONSE: Proposed N.J.A.C. 6A:16-7.2(a)5i establishes the maximum amount of time that may pass before the educational services are provided. Since the proposed rule at N.J.A.C. 6A:16-7.2(a)5i makes it clear that the services must be provided within five school days of the suspension, services could be provided at any time prior to the fifth day. District boards of education have discretion in determining when or whether they will provide services prior to the fifth day of the suspension.

58. COMMENT: The commenter requested that N.J.A.C. 6A:16-7.3(a)9iii be changed to be consistent with the statutory scheme and V.A. v. Collingswood. The commenter stated that the thirty day hearing requirement for long-term suspensions is inconsistent with the statutory scheme set forth at N.J.S.A. 18A:37-1 et. seq. and with the State Board decision in V.A. v. Collingswood, October 4, 2000. The statutory scheme enumerates limited instances in which the thirty-day rule applies, specifically: N.J.S.A. 18A:37-2.1, Assaults by pupil upon teacher, administrator, board member or employee of board of education; N.J.S.A. 18A:37-2.2, Assault with a weapon; and N.J.S.A. 18A:37-7, Zero Tolerance for Guns Act. The commenter stated that the statutory scheme, as interpreted by V.A., establishes that in all other cases, the board hearing must be held before the second regular meeting of the board following the suspension. **(10)**

RESPONSE: The department disagrees that N.J.A.C. 6A:16-7.3(a)9iii should be amended. The thirty-day time period for the hearing was established in N.J.S.A. 18A:37-2.4 and N.J.S.A. 18A:37-10 in 1995, after the rulings in V.A. v. Collingswood, October 4, 2000 *Goss v. Lopez*, 419 U.S. 565 at 580-582 and *R. R. v. Bd. of Ed. of Shore Regional High Sch. District*, 109 N.J. Super. 346, (Ch. Div. 1970). The thirty-day time period for a hearing established in these statutes applies to some of the most egregious student offenses: firearms and assaults with weapons. Applying a lesser time period for all other offenses warranting a long-term suspension or expulsion would unreasonably impose a more stringent due process requirement for lesser offenses, and using different time periods for various offenses would cause unnecessary confusion regarding the application of due process rights. Additionally, the thirty-day time period is consistent with the meeting schedule of district boards of education.

59. COMMENT: The commenter expressed concern that the proposed regulations do not provide a limitation on the number of short-term and consecutive short-term suspensions a district may impose. The commenter also stated concern that no guidance is offered on what warrants the length of time imposed for a short-term suspension. The commenter recommended that these limitations and guidance be provided. **(11)**

RESPONSE: The department disagrees that limitations should be provided on the number of short-term suspensions and consecutive short-term suspensions that may be imposed or what determines the length of a short-term suspension. A general parameter has been established for the maximum duration of short-term suspensions at N.J.A.C. 6A:16-1.3, Definitions. The determination of the actual duration of each suspension or the number of suspensions that may be imposed, within the parameters at N.J.A.C. 6A:16-1.3 and N.J.A.C. 6A:16-7.1 and 7.2, is best made by

the district board of education based on the facts of each case and the district board of education's code of student conduct, which must be based on broad local community involvement and accepted core ethical values.

60. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.3 make clear in a separate subsection on due process notice and hearing requirements that a student may not be suspended for more than ten days unless the board of education complies with the requirements. (8)

RESPONSE: The department disagrees. It is not necessary to propose a new section, since the proposed rules in N.J.A.C. 6A:16-7.3 include all required parameters and guidance to district boards of education for administering long-term suspensions, including all applicable due process notice and hearing requirements for students suspended for more than ten days.

61. COMMENT: The commenter stated that N.J.A.C. 6A:16-7.3 should clarify that the notice and informal hearing requirements of short-term suspension apply to long-term suspension in addition to the specific requirements for suspensions of more than ten days. (8, 11)

RESPONSE: The department agrees, since student due process rights in the event of a long-term suspension, pursuant to N.J.A.C. 6A:16-7.3, include notice and an informal hearing. The department will propose the following amendments to clarify the hearing requirements in N.J.A.C. 6A:16-7.2(a)2 and N.J.A.C. 6A:16-7.3(a)2 as part of the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-7.2(a)

2. An informal preliminary hearing prior to the suspension in which the student is given the opportunity to present the student's side of the story regarding the student's actions leading to the short-term suspension and the school district's actions taken in N.J.A.C. 6A:16-7.1(c)[4]2 above; and

N.J.A.C. 6A:16-7.3(a)

2. An informal preliminary hearing prior to the suspension in which the student is given the opportunity to present the student's side of the story regarding the student's actions leading to the long-term suspension and the school district's actions taken in N.J.A.C. 6A:16-7.1(c)2 above;

- [2.]3. Immediate notification to the student's parents of the student's removal from school;

- [3.]4. Appropriate supervision of the student while waiting for the student's parents to remove the student from school during the school day.

- [4.]5. Written notification to the parents by the chief school administrator or his or her designee within two school days of the initiation of the suspension, stating:
- i. The specific charges;
 - ii. The facts on which the charges are based;
 - iii. The provision(s) of the code of student conduct the student is accused of violating;
 - [iii.]iv. The student's due process rights, pursuant to N.J.A.C. 6A:16-7.2 through 7.6; and
 - [iv.]v. That further engagement by the student in conduct warranting expulsion, pursuant to N.J.S.A. 18A:37-2, shall amount to a knowing and voluntary waiver of the student's right to a free public education, in the event that a decision to expel the student is made by the district board of education, pursuant to N.J.S.A. 18A:37-2 and N.J.A.C. 6A:16-7.5.
- (1) The district board of education shall request written acknowledgement of the notification of the provisions of N.J.A.C. 6A:16-7.3(a)3iv from the parents and the student subsequent to the removal from the student's educational program, pursuant to N.J.A.C. 6A:16-7.3.
- [5.]6. A list of witnesses and their statements or affidavits, if any;
- [6.]7. A student with a disability, a manifestation determination pursuant to N.J.A.C. 6A:14-2.8 and federal regulations incorporated by reference therein;
- [7.]8. Information on the right of the student to secure an attorney and legal resources available in the community identified pursuant to N.J.A.C. 6A:16-7.1(c)8;
- [8.]9. Educational services, either in school or out of school, that are comparable to those provided in the public schools for students of similar grades and attainments, pursuant to N.J.S.A. 18A:38-25, which may include a public education program provided in accordance with the provisions of N.J.A.C. 6A:16-9 or N.J.A.C. 6A:16-10.
- i. The services shall be provided within five school days of the suspension.

- ii. Educational services provided to a student with a disability shall be provided consistent with the student's Individualized Education Program, in accordance with N.J.A.C. 6A:14.

[9.]10. A formal hearing before the district board of education, at a minimum, shall:

- i. Be conducted by the board of education or delegated by the board to a board committee or to a school administrator for the purpose of determining facts or making recommendations.
 - (1) The board of education as a whole shall receive and consider either a transcript or detailed report on such hearing before taking final action.
- ii. Include the opportunity for the student to:
 - (1) Confront and cross-examine witnesses, when there is a question of fact; and
 - (2) Present his or her own defense and produce oral testimony or written supporting affidavits.
- iii. Take place no later than 30 calendar days following the day the student is suspended from the general education program;
- iv. Not be subject to the provisions of the "Open Public Meetings Act," pursuant to N.J.S.A. 10:4-6;

[10.]11. A written statement to the student's parents of the district board of education's decision within five school days after the close of the hearing that includes, at a minimum:

- i. The charges considered;
- ii. A summary of the documentary or testimonial evidence from both the student and the administration that was brought before the district board of education at the hearing; and
- iii. Factual findings relative to each charge and the district board of education's determination.

[11.]12. Immediate return to the general education program if at any time it is found that the general education student is not guilty of the offense.

[12.]13. For a student with a disability found not guilty of the offense, the student's program shall be determined in accordance with the provisions of N.J.A.C. 6A:14.

62. COMMENT: The commenters recommended deleting the language proposed in N.J.A.C. 6A:16-7.3(a)4iv regarding the engagement of the student in conduct amounting to a waiver of the student's constitutional right to education and expressed concerns about the definition and impact of an expulsion under the proposed regulations, specifically, N.J.A.C. 6A:16-7.5 and N.J.A.C. 6A:16-7.3(a)4iv. The commenter stated being unaware of any case law or statutory law that expressly authorizes the provision at N.J.A.C. 6A:16-7.3(a)4iv, which states that further engagement in conduct warranting expulsion by the student will amount to a knowing and voluntary waiver of a student's rights to a free and public education. The commenters stated that in the absence of case and statutory law, the Department of Education is not empowered to promulgate regulations that provide for the waiver of a student's right to a free public education and/or the permanent discontinuance of educational services or the payment of educational services. The commenters recommended that the definition of expulsion at N.J.A.C. 6A:16-1.3 and the provisions at N.J.A.C. 6A:16-7.5 be amended to clearly state that nothing in these regulations authorize a school district to permanently discontinue educational services. Additionally, the commenter recommended that the notice requirement under N.J.A.C. 6A:16-7.3(a)4iv be eliminated based on the previously stated recommendation. (8, 11)

RESPONSE: The department disagrees with the commenters' opinions and recommendations regarding student expulsion. Constitutional rights are subject to waiver. However, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences [Brady v. United States, 397 U.S. 742, 748 (1970) (analyzing waiver of individual's fundamental right to a trial before a judge or jury; State v. Cook, 179 N.J. 533 (2004) (waiver of Fifth Amendment privilege against self-incrimination must be knowing, intelligent and voluntary); South Dakota v. Dole, 483 U.S. 203 (1987) (States' waiver of Eleventh Amendment immunity must be done knowingly and cognizant of the consequences of their action); Edwards v. Arizona, 451 U.S. 477, 482 (1981) (individual may waive fundamental right to counsel guaranteed by the Sixth Amendment if waiver is voluntary and intelligent)]. In the context of the Fifth Amendment privilege against self-incrimination, the New Jersey Supreme Court has cautioned that where a juvenile is under the age of fourteen, his or her ability to make a knowing and intelligent waiver of rights is limited by immaturity, so an added layered of protection is required (State in the Interest of Q.N., 179 N.J. 165, 172-73 (2004) (concluding that juvenile validly waived Fifth Amendment privilege against self-incrimination)).

Accordingly, a student may waive his or her substantive right to a thorough and efficient system of public education if the waiver is knowing, intelligent and voluntary. In State v. Conk, 180 N.J. Super. 140, 145 (App. Div. 1981), it was determined that a student's fundamental right to an education is not absolute, but rather, "is subject to the student's

adherence to lawful conditions,” and that any student who is guilty of “continued and willful disobedience, or of open defiance of authority is liable to punishment and to suspension or expulsion from school,” pursuant to N.J.S.A. 18A:37-2. The concept of “waiver” has been applied in the context of a student’s right to a free public education. Prior to P.H. II, the Commissioner of Education held that students who refuse to obey the established rules are subject to disciplinary measures, including expulsion from further school attendance which effectively negates the student’s constitutional right to attend public school free of charge (G.F. v. Board of Educ. of Washington Tp., 1 N.J.A.R. (EDU) 55, 64 (1980); K.W. v. Board of Educ., Lower Camden Reg’l High Sch. Dist. No. 1, OAL Dkt. No. EDU 6129-99 (February 4, 2004), adopted as modified by Cmr., (March 20, 2000) (student’s right to attend public schools is not unbridled but, rather, subject to expulsion from further school attendance if found to be defiant, disobedient or violent). Therefore, by engaging in proscribed conduct, a student can knowingly, intelligently and voluntarily waive his or her right to a free public education.

The proposed regulations are based on the fact that school districts have the authority to suspend and expel students, pursuant to N.J.S.A. 18A:37-2, and that there is no law which prohibits the State Board of Education from promulgating a regulation that would allow a school district to discontinue educational services or payment for these services where a student, after imposition of an initial long-term suspension and provision of appropriate alternative educational services, again engages in conduct that warrants expulsion. However, consistent with the case law cited above, the proposed regulations that permit the discontinuance of educational services or payment for educational services as a result of proscribed student conduct, contain sufficient safeguards that advise a student and his or her parents that further engagement in conduct warranting expulsion will amount to a waiver of the student’s right to a free and public education in the event that a decision to expel the student is made by the district board of education, pursuant to N.J.S.A. 18A:37-2 and N.J.A.C. 6A:16-7.5. These safeguards include mandatory notice and acknowledgement of the notice by the student after removal from the regular education program and the procedural due process guaranteed by the Fourteenth Amendment [R.R. v. Board of Educ., 109 N.J. Super. 337 (Ch. Div. 1970)], and ensure that the student’s participation in such conduct is a knowing, intelligent and voluntary waiver of his or her right to a free public education and is done with sufficient awareness of the relevant circumstances and likely consequences. Furthermore, the proposed regulations allow expulsion only after the imposition of an initial long-term suspension and provision of appropriate alternative education, which provides juveniles with an added layer of protection.

The authorizing statute, NJ.S.A 18A:37-1 et seq., clearly distinguishes between student suspensions and student expulsions. The proposed rules provide direction to district boards of education for the administration of suspensions and expulsions that are consistent with the authorizing statute, NJ.S.A 18A:37-1 et seq., State Board of Education decisions and case law.

63. COMMENT: The commenter recommended that notice of a long-term suspension include notice of the potential consequences which may be imposed against the student if the charges are sustained. (8)

RESPONSE: The department disagrees, since the provision of this information is already required. Pursuant to proposed N.J.A.C. 6A:16-7.1(a)5, the code of student conduct is disseminated annually to all students, parents and school staff. The code of student conduct, pursuant to N.J.A.C. 6A:16-7.1(c)2, must include a description of the behaviors that will result in suspension or expulsion, pursuant to N.J.S.A. 18A:37-2. N.J.A.C. 6A:16-7.1(c)3 requires the code of conduct to include a description of students' rights that include advance notice of behaviors that will result in suspensions and expulsions, that have been identified under authority of N.J.S.A. 18A:37-2.

64. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.3(a)5 set some parameters for when the list of witnesses and statements is provided, since it is critical to the student's due process rights. (8)

RESPONSE: The department agrees that in establishing student's due process rights it is important to set parameters for when the list of witnesses and statements are provided. The department will propose the following amendment in N.J.A.C. 6A:16-7.3(a)5 providing time parameters for providing parents with a list of witnesses and their statements or affidavits as part of the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16:

5. A list of witnesses and their statements or affidavits, if any[;], no later than five days prior to the formal hearing, pursuant to N.J.A.C. 6A:16-7.3(a)9;

65. COMMENT: The commenter stated that the provisions at N.J.A.C. 6A:16-7.3(a)7 should include a requirement for district boards of education to provide the student suspended pursuant to N.J.A.C. 6A:16-7.3 with information on legal resources. (1)

RESPONSE: The department agrees. This amendment to N.J.A.C. 6A:16-7.3(a)7 was included in the notice of proposal published in the May 16, 2005 edition of the New Jersey Register.

66. COMMENT: The commenter recommended that if the local board of education delegated responsibility for the hearing to a subcommittee of the board or to some other person, the board should be required to obtain a transcript of the hearing, not just a detailed report, before making a final decision. (8)

RESPONSE: The department disagrees that district boards of education should be required to receive a transcript of the formal hearing for every formal hearing conducted pursuant to N.J.A.C. 6A:16-7.3(a)9. Since the district board of education is delegating authority for the formal hearing, it is their responsibility to determine whether

they should receive a transcript or a detailed report of the hearing, as set forth in N.J.A.C. 6A:16-7.3(a)9i(1), before taking final action.

67. COMMENT: The commenter recommended that the local board of education be permitted to hire a “hearing officer” such as an attorney to assume the responsibility of the hearing. (8)

RESPONSE: The department agrees because it is common practice for the hearing to be conducted by a hearing officer or an attorney. The department will propose the following amendment to N.J.A.C. 6A:16-7.3(a)9i, to permit an impartial hearing officer to conduct the formal hearing, as part of the comprehensive review of the provisions in N.J.A.C. 6A:16 that will take place during the readoption of N.J.A.C. 6A:16:

- i. Be conducted by the board of education or delegated by the board to a board committee, [or to] a school administrator or to an impartial hearing officer for the purpose of determining facts or making recommendations.

68. COMMENT: The commenter stated that N.J.A.C. 6A:16-7.3(a)9iii is unconstitutional because it permits districts to impose a long-term suspension upon a student without affording him or her a full hearing within 21 days of when the student was initially suspended, as required under R.R. v. Board of Educ. of Shore Regional High School Dist., 109 N.J. Super. 337 (Ch. Div. 1970). (8)

RESPONSE: The department disagrees. The thirty-day time period for the hearing has been established in N.J.S.A. 18A:37-10(b) and N.J.S.A. 18A:37-2.4(b), both of which were adopted after the findings of R.R. v. Board of Educ. of Shore Regional High School Dist., 109 N.J. Super. 337 (Ch. Div. 1970). Therefore, the due process provisions are consistent with the authorizing statutes.

The thirty-day time period for a hearing established in these statutes applies to some of the most egregious student offenses: firearms and assaults with weapons. Applying a lesser time period for all other offenses warranting a long-term suspension or expulsion would unreasonably impose a more stringent due process requirement for lesser offenses, and using different time periods for various offenses would cause unnecessary confusion regarding the application of due process rights. Additionally, the thirty-day time period is consistent with the meeting schedule of district boards of education. Finally, students removed pursuant to N.J.A.C. 6A:16-7.2 and 7.3 must be provided with comparable educational services within five days of the suspension.

69. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.3(a)10 clearly require that the decision include the local board of education’s conclusion with respect to the charges and its decision with respect to any consequences imposed. The commenter stated that the notice be specific to any term of suspension and to any condition of the student’s return to school as well as any readmission procedures

that may be required or available. The commenter also recommended that the notice include a statement of the student's right to appeal an unfavorable decision to the Commissioner of Education. (8)

RESPONSE: The department agrees, since the addition of the language will clarify the requirements of district boards of education. The department will propose the following amendments to N.J.A.C. 6A:16-7.3(a)10, to expand the criteria for the written statement to parents, as part of the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16:

10. A written statement to the student's parents of the district board of education's decision within five school days after the close of the hearing that includes, at a minimum:
 - i. The charges considered;
 - ii. A summary of the documentary or testimonial evidence from both the student and the administration that was brought before the district board of education at the hearing; [and]
 - iii. Factual findings relative to each charge and the district board of education's determination of each charge[:];
 - iv. Identification of the educational services to be provided to the student, pursuant to N.J.A.C. 6A:16-7.3(a)8;
 - v. The terms and conditions of the suspension; and
 - vi. The right to appeal the district board of education's decision regarding the student's general education program to the Commissioner of Education in accordance with N.J.S.A. 18A:37-2.4 and N.J.A.C. 6A:3-1.3 through 1.17.

70. COMMENT: The commenter expressed concern that N.J.A.C. 6A:16-7.3(a)12 does not have the same effect as that of N.J.A.C. 6A:16-7.3(a)11 and that there is no explicit provision requiring the immediate return of the child with a disability to his or her former placement. The commenter recommended that to ensure equal treatment, N.J.A.C. 6A:16-7.3(a)12 be changed to mirror N.J.A.C. 6A:16-7.3(a)11. (11)

RESPONSE: The department disagrees that N.J.A.C. 6A:16-7.3(a)12 should be amended to mirror N.J.A.C. 6A:16-7.3(a)11. Since the removal pursuant to N.J.A.C. 6A:16-7.3 is for more than 10 days, a determination has already been made with respect to the placement of a student with a disability, pursuant to N.J.A.C. 6A:14 and N.J.A.C. 7.3(a)6. Since the student already may have had his or her placement altered, it might not be possible to immediately return the student to the former placement, and the Individualized Education Program team may determine that another placement is more

appropriate for the student's educational needs. Additionally, pursuant to N.J.A.C. 6A:16-7.3(a)12, any other placement also must be made in accordance with N.J.A.C. 6A:14.

71. COMMENT: The commenters recommended that the term “not guilty” be removed and replaced with “found not to have committed” or “found not to be in violation of the code of student conduct” in N.J.A.C. 6A:16-7.3(a)11 and 12. The commenter stated that the term “not guilty” has certain connotations in criminal law with regard to the standard of proof, usually “beyond a reasonable doubt.” In an administrative proceeding, such as a suspension or expulsion, the standard of proof is usually by a “preponderance of the evidence” and the decision is judged on an “arbitrary or capricious” standard. **(10, 11)**

RESPONSE: The department agrees that the use of the term “guilty” connotes criminal charges, and will propose the following amendments to N.J.A.C. 6A:16-7.3(a)11 to replace the term, “is not guilty of,” with “did not commit” and to N.J.A.C. 6A:16- 7.3(a)12, to replace the term, “guilty of,” with “to have committed,” during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-7.3(a)

11. Immediate return to the general education program if at any time it is found that the general education student [is not guilty of] did not commit the offense.
12. For a student with a disability found not [guilty of] to have committed the offense, the student's program shall be determined in accordance with the provisions of N.J.A.C. 6A:14.

72. COMMENT: The commenter stated that the regulation at N.J.A.C. 6A:16-7.3(c), which provides districts the ability to continue a suspension past the board's second meeting under certain circumstance, must be changed to clearly reflect that it does not provide for, or permit, the use of open-ended suspensions by districts. **(11)**

RESPONSE: The department disagrees that the rule text proposed at N.J.A.C. 6A:16-7.3(c) should be amended to include a description that the rule does not provide for, or permit, the use of open-ended suspensions by districts. The rule specifically establishes that the decision to continue a suspension “may not be continued beyond the district board of education's second regular meeting following the suspension...” Additionally, N.J.A.C. 6A:16-7.3(d) makes clear that when the district board of education votes to continue the suspension of a regular education student, the district board of education is required to “review the case at each subsequent district board of education meeting...” and, pursuant to N.J.A.C. 6A:16-7.3(d)3, make a determination on whether the comparable educational services, pursuant to N.J. A.C. 6A:16-7.3(a)8, should continue or whether the student should return to school.

However, the department will propose the following amendment during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16, to replace the word “may” with the term “shall” to make it clear that the rule at N.J.A.C. 6A:16-7.3(c) should be required and not permissive.

N.J.A.C. 6A:16-7.3(c)

(c) Suspension of general education students [may]shall not be continued beyond the district board of education’s second regular meeting following the suspension, unless the district board of education so determines, pursuant to N.J.S.A. 18A:37-5;

The department also will propose the following amendments during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16, to change the word “if” to the term “whether” in N.J.A.C. 6A:16-7.3(d)3 for grammatical purposes and to include the citation for the requirement regarding the current educational placement that is identified in the rule:

N.J.A.C. 6A:16-7.3(d)3

3. [If]Whether the suspended student’s current placement, pursuant to N.J.A.C. 6A:16-7.3(a)8, should continue or [if]whether the student should return to the general education program.

73. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.3(c) clarify that a student’s suspension may only continue beyond the board’s second meeting only after the student has been provided an opportunity for a full hearing. **(8)**

RESPONSE: The department disagrees. As a practical matter, since the formal hearing must take place within 30 days of the suspension, it would be impossible for the district board of education to continue a suspension beyond its second regular meeting following the suspension, without first conducting the formal hearing. Even if the suspension occurred one day before a scheduled board meeting, the hearing is required to take place within 30 days of the suspension, which would be, at a minimum, one day prior to the second board meeting, assuming the board meets monthly. If the suspension occurred on a board meeting day, the hearing would be required to take place either before or on the next monthly board meeting date, which would occur prior to the second regular meeting following the suspension.

74. COMMENT: The commenter stated that the department should include in N.J.A.C. 6A:16-7.3(c) time parameters for the length of a student suspension in the event that a district board of education does not convene a regularly scheduled meeting during the time the suspension is in effect. **(1)**

RESPONSE: Since the minimum frequency of board meetings is established pursuant to N.J.S.A. 18A:10-6, in the extremely unlikely event that a regular board meeting is cancelled without prompt rescheduling, the department believes that the situation should be dealt with on a case-by-case basis, rather than by a general rule. However, the notice of proposal published in the May 16, 2005 edition of the New Jersey Register the department has proposed an amendment at N.J.A.C. 6A:16-7.3(c)2 to require that each district board of education adopt policies and procedures providing for action on student suspensions in the event of cancellation of the first or second regular board meetings referenced in N.J.S.A. 18A:37-4 and 37-5.

75. COMMENT: The commenter recommended that procedures and standards for determining when a suspension may be continued beyond ten days be included in N.J.A.C. 6A:16-7.3(c). **(8)**

RESPONSE: The department disagrees. With the exception of the required time periods for suspensions due to offenses pursuant to N.J.A.C. 6A:16-5.5 and N.J.A.C. 6A:16-5.6, decisions regarding suspensions are best determined by district boards of education, based on the locally determined codes of student conduct, pursuant to N.J.A.C. 6A:16-7.1, and the unique and fact sensitive issues and circumstances of each case.

76. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.3(d) and (e) be amended to clarify that the use of open-ended suspensions are prohibited. **(8)**

RESPONSE: The department disagrees. Pursuant to N.J.S.A. 18A:37-5, the power to reinstate, continue any suspension reported to it or expel a student is specifically vested in each district board of education. Additionally, N.J.S.A. 18A:37-2 establishes the minimum causes for conduct warranting suspension or expulsion and makes clear that students must be liable to punishment and to suspension or expulsion from school for these causes.

77. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.3(f) be amended to clarify that the input referred to in this section must be obtained prior to any expulsion hearing. **(8)**

RESPONSE: The department agrees and will propose the following amendments to N.J.A.C. 6A:16-7.3(a)8 and N.J.A.C. 6A:16-7.3(f), to establish that the required input must be obtained prior to a hearing, as part of the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-7.3

[(f) The district board of education shall make decisions regarding the appropriate educational program and support services for the suspended general education student, at a minimum, based on the following criteria:

1. A behavioral assessment or evaluation including, but not limited to, a referral to the child study team, as appropriate;
2. The results of any relevant testing, assessments or evaluations of the student;
3. The student's academic, health and behavioral records;
4. The recommendation of the chief school administrator, principal or other relevant school or community resource; or
5. Consultation with the Intervention and Referral Services team, in accordance with N.J.A.C. 6A:16-8, as appropriate.]

N.J.A.C. 6A:16-7.3(a)

8. Educational services, either in school or out of school, that are comparable to those provided in the public schools for students of similar grades and attainments, pursuant to N.J.S.A. 18A:38-25, which may include a public education program provided in accordance with the provisions of N.J.A.C. 6A:16-9 or N.J.A.C. 6A:16-10.

- i. The services shall be provided within five school days of the suspension.

ii. [Educational services provided to a student with a disability shall be provided consistent with the student's Individualized Education Program, in accordance with N.J.A.C. 6A:14.]The district board of education shall make decisions regarding the appropriate educational program and support services for the suspended general education student, at a minimum, based on the following criteria:

- (1) A behavioral assessment or evaluation including, but not limited to, a referral to the child study team, as appropriate;
- (2) The results of any relevant testing, assessments or evaluations of the student;
- (3) The student's academic, health and behavioral records;
- (4) The recommendation of the chief school administrator, principal or other relevant school or community resource;
or

(5) Consultation with the Intervention and Referral Services team, in accordance with N.J.A.C. 6A:16-8, as appropriate.

iii. Educational services provided to a student with a disability shall be provided consistent with the student's Individualized Education Program, in accordance with N.J.A.C. 6A:14.

78. COMMENT: The commenter stated that if the recommendation to remove the language codifying alternative education for suspended students, to be paid for by the local school district, is not removed, the phrase “whichever comes first” should be added to the last sentence in N.J.A.C. 6A:16-7.3(g). **(10)**

RESPONSE: The department agrees with the suggested addition of language, since it clarifies the intention of the proposed rule. The department will propose the following amendment to establish that the required services must be provided until the student graduates from high school or reaches the age of twenty, whichever comes first, during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16:

N.J.A.C. 6A:16-7.3(g)

“(g) A district board of education shall provide a general education student suspended under this section with an appropriate educational program or appropriate educational services, based on the criteria set forth under (f) above, until the student graduates from high school or reaches the age of twenty, whichever comes first.”

79. COMMENT: The commenter states that regulations permitting districts to discontinue educational services or discontinue payment of educational services for a student who has, subsequent to being placed in an alternative education program, engaged in conduct that warrants expulsion is contrary to the State Board’s holding in P.H. II and III. **(8)**

RESPONSE: The department disagrees. In the P.H. II (P.H. v. Board of Educ. of the Borough of Bergenfield) decision, in which the State Board of Education held that petitioner’s son, M.C., who had been permanently expelled from the district’s regular education program by the local board of education, pursuant to N.J.S.A. 18A:37-2, was required to be provided with alternative education until he either graduated from high school or reached his nineteenth birthday, whichever came first, and in P.H. III, the State Board concluded that N.J.S.A. 18A:38-1 et seq. obligates the district to provide M.C. with a free public education until his twentieth birthday. The facts in P.H. II, however, only involved a student’s initial expulsion. That is, P.H. II did not involve a student who was expelled, was provided with appropriate alternative education and, subsequently, again or repeatedly engaged in conduct warranting expulsion, pursuant to N.J.S.A. 18A:37-2. Additionally, the term “expulsion” as used in the P.H. decision was not defined or used in the same way as it is in N.J.A.C. 6A:16-1.3 and N.J.A.C. 6A:16-7.5. In P.H. II, the State Board of Education acknowledged the following: “We recognize

that the question of whether a student who has been permanently expelled from school but who is not incarcerated is entitled to continue his education in an alternative setting has not been settled.” Consequently, neither P.H. II nor P.H. III directly controls the outcome of a student who after the provision of alternative educational services repeatedly engages in conduct warranting expulsion.

P.H. III, however, holds that a student’s substantive right to continue his or her education following his or her removal from the regular education program for disciplinary reasons is derived from the New Jersey Constitution. A key question, therefore, is whether a student, through his or her repeated actions warranting expulsion may waive his or her substantive right to a thorough and efficient system of free public education. Neither P.H. II nor P.H. III determined whether a student could ever waive his or her state constitutional right to a thorough and efficient system of free public education by engaging in proscribed conduct.

Constitutional rights are subject to waiver. However, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences [Brady v. United States, 397 U.S. 742, 748 (1970) (analyzing waiver of individual’s fundamental right to a trial before a judge or jury; State v. Cook, 179 N.J. 533 (2004) (waiver of Fifth Amendment privilege against self-incrimination must be knowing, intelligent and voluntary); South Dakota v. Dole, 483 U.S. 203 (1987) (States’ waiver of Eleventh Amendment immunity must be done knowingly and cognizant of the consequences of their action); Edwards v. Arizona, 451 U.S. 477, 482 (1981) (individual may waive fundamental right to counsel guaranteed by the Sixth Amendment if waiver is voluntary and intelligent)]. In the context of the Fifth Amendment privilege against self-incrimination, the New Jersey Supreme Court has cautioned that where a juvenile is under the age of fourteen, his or her ability to make a knowing and intelligent waiver of rights is limited by immaturity, so an added layered of protection is required (State in the Interest of Q.N., 179 N.J. 165, 172-73 (2004) (concluding that juvenile validly waived Fifth Amendment privilege against self-incrimination)).

Accordingly, a student may waive his or her substantive right to a thorough and efficient system of public education if the waiver is knowing, intelligent and voluntary. In State v. Conk, 180 N.J. Super. 140, 145 (App. Div. 1981), it was determined that a student’s fundamental right to an education is not absolute, but rather, “is subject to the student’s adherence to lawful conditions,” and that any student who is guilty of “continued and willful disobedience, or of open defiance of authority is liable to punishment and to suspension or expulsion from school,” pursuant to N.J.S.A. 18A:37-2. The concept of “waiver” has been applied in the context of a student’s right to a free public education. Prior to P.H. II, the Commissioner of Education held that students who refuse to obey the established rules are subject to disciplinary measures, including expulsion from further school attendance which effectively negates the student’s constitutional right to attend public school free of charge (G.F. v. Board of Educ. of Washington Tp., 1 N.J.A.R. (EDU) 55, 64 (1980); K.W. v. Board of Educ., Lower Camden Reg’l High Sch. Dist. No. 1, OAL Dkt. No. EDU 6129-99 (February 4, 2004), adopted as modified by Cmr.,

(March 20, 2000) (student's right to attend public schools is not unbridled but, rather, subject to expulsion from further school attendance if found to be defiant, disobedient or violent). Therefore, by engaging in proscribed conduct, a student can knowingly, intelligently and voluntarily waive his or her right to a free public education.

The proposed regulations are based on the fact that school districts have the authority to suspend and expel students, pursuant to N.J.S.A. 18A:37-2, and that there is no law which prohibits the State Board of Education from promulgating a regulation that would allow a district to discontinue educational services or payment for these services where a student, after imposition of an initial long-term suspension and provision of appropriate alternative educational services, again engages in conduct that warrants expulsion. However, consistent with the case law cited above, the proposed regulations that permit the discontinuance of educational services or payment for educational services as a result of proscribed student conduct, contain sufficient safeguards that advise a student and his or her parents that further engagement in conduct warranting expulsion will amount to a waiver of the student's right to a free and public education in the event that a decision to expel the student is made by the district board of education, pursuant to N.J.S.A. 18A:37-2 and N.J.A.C. 6A:16-7.5. These safeguards include mandatory notice and acknowledgement of the notice by the student after removal from the regular education program and the procedural due process guaranteed by the Fourteenth Amendment [R.R. v. Board of Educ., 109 N.J. Super. 337 (Ch. Div. 1970)], and ensure that the student's participation in such conduct is a knowing, intelligent and voluntary waiver of his or her right to a free public education and is done with sufficient awareness of the relevant circumstances and likely consequences. Furthermore, the proposed regulations allow expulsion only after the imposition of an initial long-term suspension and provision of appropriate alternative education, which provides juveniles with an added layer of protection.

The proposed rules allow school districts to permanently remove a student for reasons authorized under N.J.S.A. 18A:37-2 and in accordance with existing case law, while assuring the student his or her right to receive a free public education subsequent to a long-term suspension from school and notification to the student and his or her parents that further engagement by the student in conduct warranting expulsion, pursuant to N.J.S.A. 18A:37-2, will amount to a knowing and voluntary waiver of the student's right to a free public education, in the event that a decision to expel the student is made by the district board of education, pursuant to N.J.S.A. 18A:37-2 and N.J.A.C. 6A:16-7.5.

80. COMMENT: The commenter recommended that the student conduct regulations uphold the right of an expelled student to alternative education. The commenter stated that the changes proposed as part of the agency initiated changes at the second discussion level presented at the December 1, 2004 State Board Meeting impermissibly narrow the right recognized by the State Board in P.H. II and III of an expelled student to an alternative education program, pursuant to N.J.A.C. 6A:16-7.3. The commenter stated that the proposed regulations should be amended to fully protect the right of an expelled student to an alternative education program until the age of twenty. (8)

RESPONSE: The department disagrees. First, the provisions at N.J.A.C. 6A:16-7.2(a)5 and 7.3(a)8, which require the provision of educational services, either in school or out of school, that are comparable to those provided in the public schools for students of similar grades and attainments, pursuant to N.J.S.A. 18A:38-25, which may include a public education program provided in accordance with the provisions of N.J.A.C. 6A:16-9 or N.J.A.C. 6A:16-10, only apply to short-term and long-term suspensions, and do not apply to expulsions, pursuant to N.J.A.C. 6A:16-7.5.

Second, the proposed regulations for both short-term and long-term suspensions at N.J.A.C. 6A:16-7.2(a)5 and 7.3(a)8 require district boards of education to provide for the provision of educational services, either in school or out of school, that are comparable to those provided in the public schools for students of similar grades and attainments, pursuant to N.J.S.A. 18A:38-25. These provisions make it clear that the primary responsibility of district boards of education in these instances is to provide students with equivalent educational services. This obligation is both consistent with the findings under P.H. II and III and exceeds the educational criterion established in P.H.

Finally, it is not relevant in this context, whether the comparable educational services are provided in the regular school setting, through alternative education programs, pursuant to N.J.A.C. 6A:16-9, or home or out-of-school instruction for general education students, pursuant to N.J.A.C. 6A:16-10, or through some other means. The regulations make it clear that district boards of education must provide suspended students with an equivalent education, and provides district boards of education with discretion in determining the appropriate approach for providing the comparable educational services, which could include the provision of educational services in the general education setting, rather than limiting the services to alternative education programs.

81. COMMENT: The commenter stated that the regulations should not permit an expulsion hearing to occur before a school administrator of the same district. The commenter expressed concern that if the hearing occurs before a school administrator of the same district, it will be too difficult for the administrator to be neutral in the expulsion hearing. (8)

RESPONSE: The department disagrees since appropriate safeguards for hearings conducted by a school administrator are provided at proposed N.J.A.C. 6A:16-7.3(a)9. Specifically, while the hearing may be delegated to a school administrator, proposed N.J.A.C. 6A:16-7.3(a)9 makes clear that the sole purpose is to determine facts or make recommendations. The district board of education is responsible for making final determinations and not the school administrator who may have conducted the hearing.

82. COMMENT: The commenter stated objection to the promulgation of N.J.A.C. 6A:16-7.6 because it permits a district to impose discipline for conduct that has occurred “away from school grounds.” The commenter stated that, at a minimum, further guidance is needed to define when it might be “appropriate” for a district to act in accordance with N.J.A.C. 6A:16-7.2, 7.3 or 7.5. The commenter stated that the

regulation should also limit the areas away from school grounds in which discipline may be imposed, to areas where there is a nexus to school related activities or functions. (11)

RESPONSE: The department disagrees with the comments opposing N.J.A.C. 6A:16-7.6. Pursuant to N.J.S.A. 18A:25-2, school officials are required to hold every student accountable for disorderly conduct in school, during recess, on the playgrounds of the school and on the way to and from school. In R.R. v. Board of Educ., 109 N.J. Super. 346, (Ch. Div. 1970), the court established that school officials have the right to expel or suspend a student for conduct away from school grounds where such is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, teachers or public school property. Additionally, the Commissioner of Education in S.H. v. Lacey Twp. Bd. of Ed., 1998 S.L.D. June 19; N.M. v. Board of Education of the Township of Wall, 2001 S.L.D. December 28; and M.D. and E.D. v. Buena Regional School District, 2000 S.L.D. Sept. 1, decided that district boards of education can impose consequences for student conduct outside of school-sponsored functions.

Sufficient guidance is provided to district boards of education in N.J.A.C. 6A:16-7.6. Specifically, as set forth in N.J.A.C. 6A:16-7.6(a)3, the consequences pursuant to N.J.A.C. 6A:16-7.6, Conduct away from school grounds must be handled in accordance with the district board of education approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, which must include a description of student's rights, and must be handled in accordance with the due process provisions and other requirements, as appropriate, pursuant to N.J.A.C. 6A:16-7.2, Short-term suspensions, N.J.A.C. 6A:16-7.3, Long-term suspensions and N.J.A.C. 6A:16-7.5, Expulsions. Parameters for the implementation of the rule, which are derived from the R.R. case, are also established at N.J.A.C. 6A:16-7.6(a)1 and 2.

The department disagrees that the rules should limit the areas away from school grounds in which discipline may be imposed. It has been established in State Board 2003 S.L.D. December 3 that distance is not determinative of the nexus between the activity and the district board of education's ability to discipline. Additionally, the rules should not limit the areas away from school grounds in which discipline may be imposed, since there may be no relationship between the location of an incident and the threat posed by a student to himself or herself or the safety of other students, staff or school grounds, pursuant to N.J.A.C. 6A:16-7.1(a)1.

The department agrees, however, that the implementation of the rule should be limited to where there is a connection to school-related activities. In support of this position, N.J.A.C. 6A:16-7.6(a)2 makes it clear that the authority to impose consequences for conduct away from school grounds will be exercised only when the subject of the consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.

83. COMMENT: The commenter asked for examples of when the provisions proposed at N.J.A.C. 6A:16-7.6 would apply. (7)

RESPONSE: The provisions at N.J.A.C. 6A:16-7.6, Conduct away from school grounds are to be exercised only in instances when student conduct away from school grounds threatens the safety and well-being of students, staff and school grounds and when the conduct materially and substantially interferes with appropriate discipline in the operation of the school. Examples of situations that could apply to the application of the regulations include gang activity, firearms or other weapons offenses, and assaults and other forms of violence.

84. COMMENT: The commenter asked the department to consider and clarify the provisions of N.J.A.C. 6A:16-7.6(a)1 in the context of the issues posed in comment #12 of this document, which referred to the definition of “Code of Student Conduct,” pursuant to N.J.A.C. 6A:16-1.3. **(10)**

RESPONSE: N.J.A.C. 6A:16-7.6(a)1 is proposed to establish that the right of school authorities to impose a consequence on a student for conduct away from school grounds, including on a school bus or at a school-sponsored function, has limits. The provision establishes that the authority to impose a consequence on a student for conduct away from school grounds will be exercised only when it is reasonably believed by school authorities that such action will protect the student or will protect other students, staff or school grounds. N.J.A.C. 6A:16-7.6(a)1 through 3 provide parameters for decision making by school authorities in imposing a consequence on a student for conduct away from school grounds.

85. COMMENT: The commenter asked the department to indicate whether student’s due process rights apply to instances when school officials have imposed a consequence on a student for conduct away from school grounds, pursuant to N.J.A.C. 6A:16-7.6, Conduct away from school grounds. **(3)**

RESPONSE: The proposed rules at N.J.A.C. 6A:16-7.6(a)3 establish that the consequence pursuant to N.J.A.C. 6A:16-7.6, Conduct away from school grounds must be handled in accordance with the district board of education approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, which must include a description of student’s rights, and must be handled in accordance with the due process provisions and other requirements, as appropriate, pursuant to N.J.A.C. 6A:16-7.2, Short-term suspensions, N.J.A.C. 6A:16-7.3, Long-term suspensions and N.J.A.C. 6A:16-7.5, Expulsions.

86. COMMENT: The commenter recommended the word “rights” be removed from the title of N.J.A.C. 6A:16-7.7, as the language in the section makes no reference to rights, nor enumerates staff rights. **(10)**

RESPONSE: The department agrees, and will propose the following amendment to remove the term “and rights” from the title in N.J.A.C. 6A:16-7.7, during the comprehensive review of the provisions in N.J.A.C. 6A:16 that will take place during the readoption of N.J.A.C. 6A:16:

“6A:16-7.7 Staff responsibilities [and rights]”

87. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.8 be amended to require that districts adopt and implement policies regarding denial of credit, written notice of specific conduct by the student that violates the district’s attendance policy, an opportunity to review all attendance records related to the student, and an opportunity for a due process hearing before a denial of credit is imposed. (8)

RESPONSE: The department agrees that district boards of education should be required to adopt and implement policies regarding denial of credit and due process provisions pursuant to N.J.A.C. 6A:16-7.8. Due to the substantive nature of the issue, the department will take the matter under advisement and consider appropriate amendments to N.J.A.C. 6A:16-7.8 as part of the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16:

88. COMMENT: The commenter recommended that the attendance code include language prohibiting schools from responding inappropriately to older students with attendance problems. (8)

RESPONSE: The department agrees. Pursuant to N.J.A.C. 6A:16-7.1(c)5iii, district boards of education are required to provide for the equitable application of the code of student conduct, which includes the rules for attendance at N.J.A.C. 6A:16-7.8.

89. COMMENT: The commenter recommended a requirement for the referral to or consultation with school district Individualized Education Program teams for students with disabilities who accumulate unexcused absences. (8)

RESPONSE: The department agrees there should be a requirement for involvement of the Individualized Education Program teams for students with disabilities who accumulate unexcused absences. The rule at N.J.A.C. 6A:16-7.8(b) establishes this requirement. Specifically, N.J.A.C. 6A:16-7.8(b) sets forth that “For students with disabilities, the attendance plan and punitive and remedial procedures set forth therein shall be applied, where applicable, in accordance with the students’ Individualized Education Programs, pursuant to 20 USC § 1400, the Individuals with Disabilities Act; the procedural protections set forth in N.J.A.C. 6A:14; accommodation plans under Section 504 of the Rehabilitation Act of 1973; and individualized health care plans, pursuant to N.J.A.C. 6A:16-2.1(e)x.”

90. COMMENT: The commenter stated that if the requirement in the federal special education law that special education records must be shared with law enforcement and judicial authorities, 34 C.F.R. 300.529(b), applies to truancy proceedings, school districts should be directed to provide such records to the municipal court. (8)

RESPONSE: The department disagrees. The Federal requirement to share special education records with law enforcement and judicial authorities, pursuant to 34 C.F.R. 300.529(b), only applies to criminal offenses. Truancy is not a criminal offense.

91. COMMENT: The commenter recommended that the regulations which require that school officials make a reasonable attempt to notify parents of absences or referrals define reasonable efforts to require the sending of written notice if the parents cannot be reached by telephone. (8)

RESPONSE: The department disagrees that the rules should define “reasonable efforts,” as set forth in N.J.A.C. 6A:16-7.8, Attendance, to require the sending of written notice if the parents cannot be reached by telephone. The sending of written notice in every instance when a parent can not be reached would place an undue burden on district board of education employees. Additionally, the standard of “reasonableness” is both a legal concept and a common sense approach that is sufficient for the procedures required in N.J.A.C. 6A:16-7.8.

92. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.8(a)3 require the creation of a definition of excused absences, rather than unexcused absences. (8)

RESPONSE: The department disagrees. A definition of unexcused absence is necessary for determining appropriate staff responses set forth in N.J.A.C. 6A:16-7.8(a)4i and ii, as well as for determining student truancy, pursuant to N.J.S.A. 18A:38-27 and N.J.A.C. 6A:16-7.8(a)4iii. There is no requirement or need for a definition of excused absences because it is unnecessary to define opposites.

93. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.8(a)3 specify that absences for the observance of religious holidays must be excused and for districts to notify parents and school personnel on how to access the Commissioner’s annual list of religious holidays whose observance must be excused. (8)

RESPONSE: The department agrees that the district board of education policies pursuant to N.J.A.C.6A:7.8(a)3 should specify that absences for the observance of religious holidays must be excused and include information for parents and school staff on how to access the annual list of excused religious observances, pursuant to N.J.S.A. 18A:36-14 through 16. The department will propose amendments to this effect during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16.

94. COMMENT: The commenter stated that there will be additional costs associated with the new attendance requirements. The commenter asked who will pay the costs and suggested that additional administrative costs for attendance not be included in the administrative cost limits of S1701, P.L. 2004, ch.73. (10)

RESPONSE: The department disagrees that there will be additional costs for implementing the provisions of N.J.A.C. 6A:16-7.8, Attendance, since all district boards of education currently have the staff resources for fulfilling the proposed rules. The proposed regulations have been developed in support of the existing statute at N.J.S.A. 18A:38-29 that requires the designated school attendance officer to examine all violations of N.J.S.A. 18A:38-25, which requires regular school attendance for children. Additionally, the rules support existing N.J.S.A. 18A:36-25, which requires district boards of education to establish policies designed for the early detection of missing and abused children. Accordingly, the attendance functions proposed at N.J.A.C. 6A:16-7.8, Attendance, could be performed by the attendance officer, at no additional cost to the district board of education. The student support functions for identified students would be performed by existing school or community resources, as appropriate, as part of their normal duties.

95. COMMENT: The commenter stated that the requirement of an “action plan” for less than four unexcused absences in N.J.A.C. 6A:16-7.8(a)4i and 6A:16-7.8(a)4ii should be removed. There is no definition for “action plan.” The purpose of this is unclear. It is not made clear who will formulate the plan and follow up on implementation of the plan. (12)

RESPONSE: The department does not agree that the term “action plan” in N.J.A.C. 6A:16-7.8(a)4i and 6A:16-7.8(a)4ii should be removed, and disagrees that it requires a definition, since it is a common term for planning. The Webster’s Ninth New Collegiate Dictionary defines a “plan” as “an often customary way of doing something,” “a method for achieving an end,” “a method devised for making or doing something or achieving an end.” The same dictionary defines an “action” as “a thing done,” “the manner or method of performing,” “the accomplishment of a thing usually over a period of time, in stages,” and implies behavior, conduct, initiative or enterprise on the part of the “actor.” Therefore, the department reinforces the dictionary definitions of the use of the terms “action” and “plan” in N.J.A.C. 6A:16-7.8. The department has determined that it is best to provide school officials with flexibility in determining the types of formats and contents of action plans that they deem appropriate for addressing the particulars of each case.

The term “action plan” in the rules does not imply or require an elaborate set of steps or involve the use of undue resources. An action plan, for example, could be a simple agreement after a phone call between the administrator and the parent that the parent will call the school when a child is being held home for legitimate reasons.

As set forth in N.J.A.C. 6A:16-7.8(a)4i(3) and 6A:16-7.8(a)4ii(4), the purpose of the action plan is to address the patterns of unexcused absences, if any, specify interventions, as appropriate, and to have a child return to school and maintain regular attendance. The designated school attendance officer(s), pursuant to N.J.S.A. 18A:38-32, in examining all violations of N.J.S.A. 18A:38-25, which requires regular school attendance for children, should be assigned the attendance functions under N.J.A.C. 6A:16-7.8. These duties may be assigned by the district board of education, as appropriate. Pursuant to fulfilling the

attendance officer role under N.J.S.A. 18A:38-32, it is expected that school districts will continue to determine who should be involved in the development of the plans.

The rules establish broad parameters for action; the nature of the actions and the resultant remedial steps undertaken by school officials will depend upon the unique circumstances of each case. Since children are required to attend school, pursuant to N.J.S.A. 18A:38-25, and district boards of education are required to examine all violations of unexcused absences, pursuant to N.J.S.A. 18A:38-29, and establish policies designed to provide for the early detection of missing and abused children, the proposed rules provide reasonable, practical and meaningful parameters for district boards of education to fulfill their responsibilities regarding school attendance by children.

The New Jersey State Police report that, on average, there are sixty students reported missing each day in New Jersey. Countless other children are absent from school for unauthorized reasons, including abuse, neglect or other problems. Truancy, which is defined under N.J.S.A. 18A:38-27 as juvenile delinquency, begins with one unexcused absence. The legitimacy of one or more unexcused absences and the appropriate supervision and safety of students who are unlawfully absent from school can not be determined without the implementation of basic, uniform practices designed to detect missing and abused children at early stages of identification, pursuant to N.J.S.A. 18A:36-25. The department believes the proposed rules provide fundamental protections for students who are absent but have not been excused from school, and reflect sound practices for verifying the safety and welfare of these students during school hours, when they are normally entrusted to the lawful care of school officials.

It should be noted that, pursuant to N.J.A.C. 6A:16-7.8(a), each district board of education is required to establish a locally determined definition of “unexcused absence” in their attendance policies and procedures that, at a minimum, must be based on N.J.A.C. 6:3-9.3. Therefore, the unexcused absences that will apply to the school staff responses for unexcused absences, per N.J.A.C. 6A:16-7.8(a)4i and N.J.A.C. 6A:16-7.8(a)4ii will be determined by the district board of education.

Last, it is important to recognize that the proposed regulations have been developed in cooperation with the Administrative Office of the Courts and the New Jersey Department of Human Services, whose representatives have expressed an interest in being assured that school districts provide uniform steps to prevent and intervene with students who are unlawfully away from school, prior to student referrals to their respective systems.

96. COMMENT: The commenter asked whether there is an action plan for parents? Why not design a law that actually makes the parents responsible for their children, instead of forcing more documentation and mandates on the already overburdened schools? Court costs should be greater for parents, and parents should be charged with theft of services. (12)

RESPONSE: The department believes that since children are required to attend school, pursuant to N.J.S.A. 18A:38-25, and district boards of education are

required to examine all violations of unexcused absences, pursuant to N.J.S.A. 18A:38-29, and establish policies designed to provide for the early detection of missing and abused children, the regulations at N.J.A.C. 6A:16-7.8, Attendance, provide reasonable, practical and meaningful parameters for district boards of education to fulfill their responsibilities regarding school attendance by children.

The commenter has suggested that the State Board of Education design a law making parents more responsible and charging parents whose children miss school illegally with theft of services. The commenter is advised that the State Board of Education adopts rules designed to conform to laws and case law; the adoption of law is the exclusive responsibility of the Legislature. However, pursuant to N.J.S.A. 18A:38-31, a parent who fails to comply with the compulsory attendance of his or her child, pursuant to N.J.S.A. 18A:38-25, is subject to a fine of not more than \$25.00 for a first offense and not more than \$100.00 for each subsequent offense, in the discretion of the court.

97. COMMENT: The commenter inquired whether the State Board of Education will pay for the mandated referral to the court program required by the Administrative Office of the Courts, pursuant to N.J.A.C. 6A:16-7.8(a)4iii? **(12)**

RESPONSE: Since the mandated referral is not a new requirement, the department does not anticipate additional costs for referring students to the court program required by the Administrative Office of the Courts. Pursuant to N.J.S.A. 18A:38-27, school districts currently must refer truant students to the appropriate legal authority, since truant students are deemed to be juvenile delinquents. Since there has not been a uniform standard for determining truancy, the rules establish for the first time when school officials must fulfill their obligations under N.J.S.A. 18A:38-27. It is possible that there will be fewer referrals in school districts whose standard for truancy has been more stringent than the standard for truancy in the proposed rule.

98. COMMENT: The commenter stated that in N.J.A.C. 6A:16-7.8(g), the phrase “until the student graduates from high school or reaches the age of twenty” extends beyond the authority granted by the Legislature. The commenter stated that the Legislature, pursuant to N.J.S.A. 18A:37-2, has provided for expulsions as a general remedy for school districts for students who have been found guilty of continued and willful disobedience. However, the statute contains no explicit requirement for alternative education by the school district, the State or anyone else. The Legislature has required alternative education for expelled students in certain circumstances, but not as a general rule. The commenter stated that to include alternative education requirements where the Legislature has not so required, is legally beyond the authority of the State Board. The commenter also stated that the language goes beyond what the Court has decided and cited State of New Jersey in the Interest of G.S., 330 N.J. Super. 383 (CH. Div. 2000) where the Court placed the obligation of providing a thorough and efficient education on the State, not on the local school district. The commenter recommended that in the case of long-term suspensions, if it is decided that an alternative educational program still be provided, that the onus be placed on the State and not the local school district. **(10)**

RESPONSE: The department disagrees that the phrase “until the student graduates from high school or reaches the age of twenty” in N.J.A.C. 6A:16-7.3(g) is inappropriate. In the P.H. II (P.H. v. Board of Educ. of the Borough of Bergenfield) decision, in which the State Board of Education held that petitioner’s son, M.C., who had been permanently expelled from the district’s regular education program by the local board of education, pursuant to N.J.S.A. 18A:37-2, was required to be provided with alternative education until he either graduated from high school or reached his nineteenth birthday, whichever came first, and in P.H. III, the State Board concluded that N.J.S.A. 18A:38-1 et seq. obligates the district to provide M.C. with a free public education until his twentieth birthday.

The department agrees that expulsion is authorized pursuant to N.J.S.A. 18A:37-2 as a general remedy for students who have been found guilty of continued and willful disobedience, and that there is no requirement for alternative education for students who are expelled, pursuant to proposed N.J.A.C. 6A:16-7.5, Expulsions. While N.J.A.C. 6A:16-7.2(a)5, 6A:16-7.3(a)8 and 6A:16-7.5(a)2 establish that students suspended from school must be provided with comparable educational services within five school days of the suspension, once a student is expelled, pursuant to N.J.A.C. 6A:16-7.5, the district board of education has determined that it will discontinue providing or paying for educational services.

While an alternative education program, pursuant to N.J.A.C. 6A:16-9 is one option for districts to consider in providing comparable educational services to suspended students, the rules at N.J.A.C. 6A:16-7.2(a)5, 6A:16-7.3(a)8 and 6A:16-7.5(a)2 do not require the provision of a particular type of educational service for students who are suspended. In regard to State payment for the educational services for suspended students, in any given fiscal year, the department will make funds available to district boards of education, subject to state appropriations, for these education services.

Finally, the decision in State of New Jersey in the Interest of G.S., 330 N.J. Super. 383 (CH. Div. 2000) is limited to students who have been adjudicated delinquent and placed on probation by the Juvenile Justice Commission.

99. COMMENT: The commenter stated that court system and the Division of Youth and Family Services of the Department of Human Services need to be in support of the schools. (12)

RESPONSE: The department agrees. The proposed regulations were developed in cooperation with the Administrative Office of the Courts and the New Jersey Department of Human Services. Representatives of these organizations demonstrated their support for schools by participating in a working group that was convened over the course of approximately one year to address the issue of student truancy and other attendance problems. The working group made recommendations to the department on truancy and other student attendance issues that were designed to provide a seamless system of support for students with attendance problems, from prevention to early intervention and remediation to late stage intervention and remediation to

adjudication. The uniform steps to prevent and intervene with students set forth in N.J.A.C. 6A:16-7.8 establish the actions schools must take as part of this system of support for truancy and other attendance problems. The participating organizations are responsible for implementing steps for assisting schools with truancy and other attendance problems, as appropriate.

100. COMMENT: The commenters stated that further regulatory guidance is needed in the area of bullying, intimidation and harassment to ensure the ability of students who are victims of such conduct to seek meaningful recourse and be fully provided with the protections provided by N.J.S.A. 18A:37-15. The commenters stated that the proposed regulations do not provide enough assistance and direction to the districts in formulating their policies. The commenters recommended that N.J.A.C. 6A:16-7.9(a)2iv provide specific examples of effective remedial actions that districts can take when a student commits an act of intimidation, harassment or bullying. Additionally, the commenters stated further definition must be added to how schools must respond to identified intimidation, harassment or bullying under N.J.A.C. 6A:16-7.9(a)2ix. The commenters recommended that the regulations include specific examples of appropriate responses, specific actions to be taken in response, services and supports to the alleged victim and notice to the victim's parent as to what is being done in response to the complaint and how their child will be protected in the school environment. **(8, 11)**

RESPONSE: The department disagrees that the guidance suggested by the commenter should be included in N.J.A.C. 6A:16-7.9. Pursuant to N.J.S.A. 18A:37-15b, district boards of education are given local control over the content of their policies prohibiting harassment, intimidation and bullying, which must be consistent with the provisions of N.J.A.C. 6A:16-7.1, Student Conduct. However, pursuant to N.J.S.A. 18A:37-15d, the Department of Education has provided guidance to school districts for the adoption of their harassment, intimidation and bullying policies. This guidance, titled *Model Policy Prohibiting Harassment, Intimidation and Bullying on School Property, At School-Sponsored Functions and on School Busses*, can be found at the following web site: <http://www.state.nj.us/njded/parents/bully.htm>.

101. COMMENT: The commenter stated that the regulations in N.J.A.C. 6A:16-7.9 appear to mandate what is permissive by statute. Additionally, the commenter expressed concern about the funding for training in N.J.A.C. 6A:16-7.9, given the permissive language in N.J.S.A. 18A:37-17 which states:

a. Schools and school districts are encouraged to establish bullying prevention programs, and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement and community members.

b. To the extent funds are appropriated for these purposes, a school district shall:

- (1) provide training on the school district's harassment, intimidation or bullying policies to school employees and volunteers who have significant contact with students; and
- (2) develop a process for discussing the district's harassment, intimidation or bullying policy with students.

(10)

RESPONSE: The department disagrees that the regulations in N.J.A.C. 6A:16-7.9 mandate the training program that is only permitted, to the extent funds are appropriated for these purposes, pursuant to N.J.S.A. 18A:37-17(b). The rules at N.J.A.C. 6A:16-7.9(d)1, only require district boards of education to conduct an annual review of training needs for the implementation of harassment, intimidation and bullying policies, programs, procedures and initiatives, as part of their annual review and update of the code of student code of conduct, of which N.J.A.C. 6A:16-7.9 is a part. Pursuant to N.J.A.C. 6A:16-7.9(d)1, staff training would be required only as deemed appropriate by the district board of education, based on the annual review pursuant to N.J.A.C. 6A:16-7.9 and N.J.A.C. 6A:16-7.1(a)3.

While training for all existing school employees and volunteers is not required, it is important to note, however, that N.J.S.A. 18A:37-17(c) requires that information regarding the district board of education's harassment, intimidation and bullying policy be incorporated into a school's employee training program. Therefore, N.J.A.C. 6A:16-7.9(d)1i has been proposed to require the employee training program required under N.J.S.A. 18A:37-17(c).

102. COMMENT: The commenter recommended that the regulations provide further guidance as to the statutory requirement that district policies include "the range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified." The commenter specifically recommended that the regulations require that the school's response include relief for the victims of bullying and harassment and the identification and correction of systemic problems. (8)

RESPONSE: The department agrees. While the department is not authorized to mandate specific actions in regard to the local policies, since pursuant to N.J.S.A. 18A:37-15 "A school district shall have local control over the content of the policy...", the department agrees that the rules should require district board of education policies to address support for victims and responses to systemic problems in regard to harassment, intimidation or bullying, in support of the requirement, pursuant to N.J.S.A. 18A:37-15(b)7, for district boards of education to establish "the range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified." Therefore, the following amendment will be proposed to N.J.A.C. 6A:16-7.9(a)2ix, to require district board of education policies to address support for victims and responses to systemic problems in regard to harassment, intimidation or bullying, as part of the comprehensive review of the provisions in N.J.A.C. 6A:16 that will take place during the readoption of N.J.A.C. 6A:16:

- ix. The range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified[;].

(1) The responses, at a minimum, shall include support for victims of harassment, intimidation or bullying and

corrective actions for documented systemic problems related to harassment, intimidation or bullying;

103. COMMENT: The commenter recommended that the regulations prevent districts from removing victims from school against their wishes, and require that the range of ways in which schools respond once an incident of bullying or harassment is identified include ways to protect the victim's safety in school. **(8)**

RESPONSE: The department disagrees that additional regulations are necessary to address the concerns articulated by the commenter. Section IV of the New Jersey Constitution has established the right of all students in the State to receive a free public education. N.J.S.A. 18A:37-2 establishes the causes for suspension or expulsion of students. Being victimized, in and of itself, is not cause for removal from school, pursuant to N.J.S.A. 18A:37-1 et seq.

Pursuant to N.J.A.C. 6A:16-7.1(c)4, school district officials are responsible for providing comprehensive behavioral supports for students, including supportive interventions and referral services and the remediation of problem behaviors. Pursuant to N.J.S.A. 18A:37-15 and N.J.A.C. 6A:16-7.9(a)2ix, district boards of education are responsible for establishing a range of ways in which school officials will respond to an incident of harassment, intimidation and bullying, which could include supportive services for victims, pursuant to N.J.A.C. 6A:16-7.1(c)4. The department has provided guidance to school districts for the development of their harassment, intimidation and bullying policies, which can be found at the following website: <http://www.state.nj.us/njded/parents/bully.htm>. The guidance explains, in part, that, "...the district should make resources (e.g., counseling) available to individual victims of harassment, intimidation and bullying and respond in a manner that does not stigmatize victim(s). Social skills training provided for all students is an example of a school or district-level response for addressing victimization." While school districts are required to have remedial and supportive services available for all students, school districts are free to choose the types of services provided to students within the student's regular school setting.

Additionally, pursuant to the department's Unsafe School Choice Option (USCO) Policy, developed pursuant to Title IX, Part E, Subpart 2, SEC. 9532, any student who becomes a victim of a violent criminal offense, as determined under the criteria in the USCO Policy, is *permitted* to attend a safe public elementary or secondary school within the local educational agency. Under the USCO Policy, victims of violent criminal offenses may not be forced to transfer to another school, but *must* be given the *opportunity* to transfer to another school when a comparable school exists in the local educational agency. The USCO Policy may be found at the following website:

<http://www.state.nj.us/njded/grants/nclb/policy/unsafe.htm>.

104. COMMENT: The commenter recommended that the regulations clarify that the payment of tuition and provision of transportation for attendance at another

school may be required if sought by a victim who has been traumatized or whose safety cannot be guaranteed. (8)

RESPONSE: The department disagrees that the proposed rules should require the payment of tuition and the provision of transportation for attendance at another school if sought by a victim who has been traumatized or whose safety cannot be guaranteed. While school districts are required to have remedial and supportive services available for all students, as described below, school districts are free to choose the types of services provided to students within the student's regular school setting. District boards of education may choose, but are not required, to pay tuition and provide transportation for student attendance at another school.

Pursuant to N.J.A.C. 6A:16-7.1(c)4, school district officials are responsible for providing comprehensive behavioral supports for students, including supportive interventions and referral services and the remediation of problem behaviors. Pursuant to N.J.S.A. 18A:37-15 and N.J.A.C. 6A:16-7.9(a)2ix, district boards of education are responsible for establishing a range of ways in which school officials will respond to an incident of harassment, intimidation and bullying, which could include supportive services for victims, pursuant to N.J.A.C. 6A:16-7.1(c)4. The department has provided guidance to school districts for the development of their harassment, intimidation and bullying policies, which can be found at the following website:

<http://www.state.nj.us/njded/parents/bully.htm>.

Additionally, pursuant to the department's Unsafe School Choice Option (USCO) Policy, developed pursuant to Title IX, Part E, Subpart 2, SEC. 9532, any student who becomes a victim of a violent criminal offense, as determined under the criteria in the USCO Policy, is *permitted* to attend a safe public elementary or secondary school *within* the local educational agency. Under the USCO Policy, victims of violent criminal offenses *must* be given the *opportunity* to transfer to another school when a comparable school exists in the local educational agency. The USCO Policy may be found at the following website: <http://www.state.nj.us/njded/grants/nclb/policy/unsafe.htm>.

105. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.9(d)1 be amended to require that districts review student training needs in the area of bullying, intimidation and harassment. (8)

RESPONSE: The department disagrees. The proposed rules at N.J.A.C. 6A:16-7.9(d)3 provide for the implementation of programs or services, which can include programs and services for students, based on the annual review of the extent and characteristics of harassment, intimidation or bullying. Additionally, the programs and services must be planned in consultation with students, parents and other community members.

106. COMMENT: The commenter recommended that in addition to referencing N.J.A.C. 6A:16-7.1(a)4, the regulation at N.J.A.C. 6A:16-7.9(d)1 specify that

the results of the annual review be included in the chief school administrator's annual public report on the implementation of the student conduct code. (8)

RESPONSE: The department disagrees. The results of the annual review of training needs regarding harassment, intimidation or bullying must be incorporated in the chief school administrator's report on the implementation of the code of student conduct, pursuant to N.J.A.C. 6A:16-7.1(a)5iii and iv.

107. COMMENT: The commenter recommended that N.J.A.C. 6A:16-7.9(d)3 which requires school districts to annually review the extent and characteristics of harassment, intimidation and bullying behavior in their school buildings to explicitly incorporate a public reporting requirement to the provision. (8)

RESPONSE: The department disagrees. The public reporting requirement is established pursuant to N.J.A.C. 6A:16-7.1(a)5.

108. COMMENT: The commenter stated that a reference to N.J.A.C. 6A:16-7.10 be placed in N.J.A.C. 6:3-6 so that all the sections of code related to pupil records can internally reference each other. (10)

RESPONSE: The department agrees that there should be internal references to rules on student records. The student records regulations proposed at N.J.A.C. 6A:32-7 are currently being considered by the State Board of Education at proposal level. The department will consider making appropriate references to N.J.A.C. 6A:16-7.10, as appropriate, within N.J.A.C. 6A:32-7, pursuant to N.J.A.C. 1:30, Rules for Agency Rulemaking.

SUBCHAPTER 11. REPORTING ALLEGATIONS OF CHILD ABUSE AND NEGLECT

109. COMMENT: The commenters stated that the regulations at N.J.A.C. 6A:16-11, Reporting Allegations of Child Abuse and Neglect should be clear, where appropriate, that the report and investigations conducted under the regulations are for instances of "alleged" child abuse or neglect, rather than for investigations of actual child abuse or neglect. The commenters also stated that the reporting procedures and mechanisms required pursuant to N.J.A.C. 6A:16-11 should be re-evaluated. (2, 5)

RESPONSE: The department agrees that the regulations should clarify that the reports are only for alleged incidents of child abuse or neglect. Amendments to N.J.A.C. 6A:16-11.2(a), 11.2(a)1, 11.2(a)4i and 11.2(a)7viii were included in the notice of proposal published in the May 16, 2005 edition of the New Jersey Register.

110. COMMENT: The commenter suggested that N.J.A.C. 6A:16-7.11 be reviewed by the Law Enforcement Working Group that authored the *Uniform State Memorandum of Agreement between Education and Law Enforcement Officials* since DYFS investigations have a law enforcement function. (10)

RESPONSE: The department agrees that N.J.A.C 6A:16-7.11 should be reviewed. Due to the substantive nature of the issues and the effect of the rules on other state agencies, N.J.A.C. 6A:16-7.11 will be reviewed during the comprehensive review of the provisions in N.J.A.C. 6A:16, which will take place during the readoption of N.J.A.C. 6A:16. Additionally, since investigations undertaken by the Division of Youth and Family Services of the Department of Human Services also have a law enforcement function, the Department of Human Services and the Attorney General's Education and Law Enforcement Working Group, which developed the *Uniform State Memorandum of Agreement between Education and Law Enforcement Officials*, will be given the opportunity to review N.J.A.C 6A:16-7.11. Possible changes to the *Memorandum of Agreement* are being considered by the Attorney General's Education and Law Enforcement Working Group, subsequent to the readoption of N.J.A.C 6A:16-7.11.